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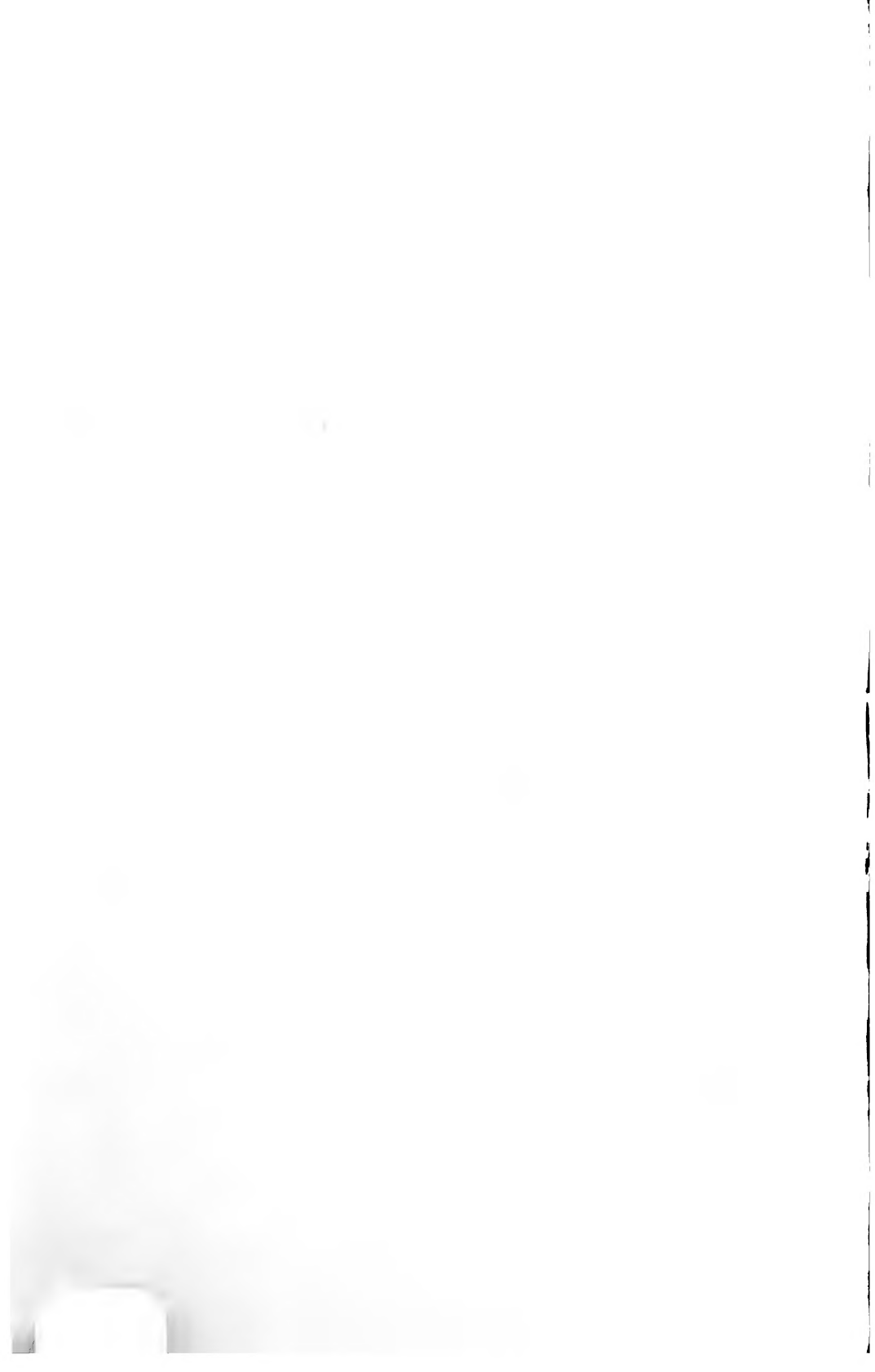
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA.

JANUARY 22, 1894—MAY 14, 1894.

BY
BENJ. I. SALINGER.

VOLUME I,
BEING VOLUME XC, OF THE SERIES.

COLUMBIA, MO.:
E. W. STEPHENS, PUBLISHER.
1895.

Entered according to act of Congress in the year 1895, for the State of Iowa,

By W. M. McFARLAND, SECRETARY OF STATE,

In the office of the Librarian of Congress, Washington, D. C.

Rec. Jan. 11, 1896.

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHARLES T. GRANGER, WAUKON, *Chief Justice.*

JOSIAH GIVEN, DES MOINES.

JAMES H. ROTHROCK, CEDAR RAPIDS.

L. G. KINNE, TOLEDO.

GIFFORD S. ROBINSON, STORM LAKE,

H. E. DEEMER, RED OAK.

OFFICERS OF THE COURT.

.JOHN Y. STONE, GLENWOOD, *Attorney General.*

GILBERT B. PRAY, WEBSTER CITY, *Clerk.*

BENJ. I. SALINGER, MANNING, *Reporter.*

JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

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- First District*—A. J. McCrary, Keokuk; JAMES D. SMYTHE, Burlington.
- Second District*—M. A. ROBERTS, Ottumwa; T. M. FEE; Centerville;
F. W. EICHELBERGER, Bloomfield; ROBERT SLOAN, Keosauqua.
- Third District*—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon.
- Fourth District*—SCOTT M. LADD, Sheldon; GEO. W. WAKEFIELD, Sioux City; F. B. GAYNOR, Le Mars; JOHN F. OLIVER, Osawa.
- Fifth District*—J. H. HENDERSON, Indianola; A. W. WILKINSON, Winterset; J. H. APPLGATE, Guthrie Center.
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- Ninth District*—W. F. CONRAD, CALVIN P. HOLMES, W. A. SPURRIER, and THOMAS F. STEVENSON, Des Moines.
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- Nineteenth District*—FRED. O'DONNELL, Dubuque; JAMES L. HUSTED, Dubuque.
-

SUPERIOR COURTS.

Cedar Rapids—THOMAS M. GIBERSON.

Council Bluffs—J. E. F. MCGEE.

Keokuk—HENRY BANK, JR.

PREFACE

This volume is issued at this late day because it had to be held until preceding ones, sent to the publisher by my predecessor after the beginning of my term of office, were completed. Future ones will follow as speedily as is consistent with proper work.

The printed abstracts and arguments which I have been able to obtain begin with filings in cases submitted at the January term, 1895. This has prevented the reporting of briefs and has, no doubt, permitted some inaccuracies in appearance, existing in the original opinion, to creep in. Corrections sent, will have attention in succeeding volumes. Few changes are made. The table of cases cited is placed at the end of the index, instead of near the table of cases reported, in which position it has sometimes been misleading. The figure on the left of the syllabus is omitted. Instead, a figure has been put, parenthetically, at the end of each section to indicate what division of the opinion the section deals with. The index has been reduced in size and an attempt made to have it conform, as far as practicable, to the indices used in the best text books. The writer has assumed that lawyers desire an index to point out, simply, where law may be found, and that they do not wish to *study* it from the index.

No effort has been spared to make the syllabi terse, clear, and yet full enough. To this end, grace of diction and refined legal nomenclature and classification have been subordinated, when necessary.

BENJ. I. SALINGER.

Manning, Iowa, August 2, 1895.

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REPORTS
OF
CASES AT LAW AND IN EQUITY,
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA,
AT
DES MOINES, JANUARY TERM, A. D. 1894.
AND IN THE FORTY-EIGHTH YEAR OF THE STATE.

E. I. MCCOY v. W. N. TREICHLER, Appellant.

Replevin: BOTH PARTIES CLAIMING OWNERSHIP. Where both parties to a replevin suit claim to own the property in controversy, the right of possession depends upon the fact of ownership. (1)

NON PREJUDICIAL INSTRUCTION. Plaintiff sought to recover as to certain books which defendant disclaimed owning. There was an instruction that plaintiff could not recover as to those books unless demand therefor had been made upon defendant, and refused. There was no proof of demand, but plaintiff recovered nothing for said books. *Held*, not prejudicial to defendant. (3)

REMITTITUR: NOT OBJECTIONABLE, WHEN. Defendant can not complain because plaintiff remits so much of his judgment as is unsupported by the proof. (4)

CONFLICTING EVIDENCE: REVIEW ON APPEAL. Where the evidence, in a law action, conflicts, it will not be reviewed on appeal. (1)

NOTE.—The numbers following each section of the syllabus indicate what division of the opinion the section deals with.

Appeal from Cedar District Court.—HON. J. H. PRESTON,
Judge.

SATURDAY, JANUARY 27, 1894.

ACTION to recover specific personal property.
Judgment for plaintiff and the defendant appeals.—
Affirmed.

W. G. W. Geiger and Wolf & Hanley for appellant.

E. M. Brink and Wheeler & Moffit for appellee.

GRANGER, C. J.—I. This action is to recover some sixty-five volumes of law books from the possession of defendant. Each party claims to be the owner of the books, and hence the right of possession depends upon the fact of ownership. Plaintiff was the owner, and still is, unless he sold them to the defendant; and the fact in the case, toward which the testimony was directed, was that of a sale of the books. The jury found that plaintiff was the owner of the books, and hence must have found, under the instructions, that there had been no sale of them. It is urged that the evidence is not sufficient to sustain the verdict. The evidence is plainly in conflict, and to such an extent that we can not interfere with the finding of the jury. No good purpose will be subserved by a discussion of the evidence bearing on the question.

II. The jury fixed the value of the books at one hundred and seventy-five dollars. Plaintiff filed a remittitur of the value thus fixed, in excess of one hundred and fifty dollars and fifty cents, and, upon the plaintiff's election to take judgment for the value of the books, the judgment rendered was for the latter amount. With the value thus reduced, the judgment for it has support in the evidence. A dispute arises over the value of thirty-five volumes of the Northwest-

ern Reporter; and appellant claims that plaintiff's own evidence shows that he bought the thirty-five volumes with other books, for eighty dollars, but it is a misapprehension of the testimony. He said that, besides the eighty dollar bill, he bought other books from the West Publishing Company, including "certain of the thirty-five volumes." The jury must have fixed the value of the books at one hundred dollars, and there is testimony to that effect.

III. In plaintiff's petition were included volumes, 73, 74, 75, and 76 of the Iowa Reports; and defendant, in his answer, did not claim to own them. And the court said to the jury that, unless the plaintiff had shown that defendant had refused, on demand, to allow plaintiff to take them, there could be no recovery as to such books; and it is urged that there was no evidence of a demand, or that defendant had them. The judgment for the one hundred and fifty-two dollars and fifty cents is based upon the values of the books other than the volumes mentioned. This appears from the estimates by both parties in argument; and hence the effect of the judgment, as it now stands, is that there is no recovery for such volumes. No prejudice has resulted from the instruction.

IV. There is a complaint as to the remitting of the excessive value of the books. That plaintiff could reduce the amount of the finding, if excessive, we have no doubt. It would be an act in favor of the other party. Appellant says: "We understand the rule to be that, in reducing the amount to where the evidence will justify it, the court simply gives the alternative to accept, or it grants a new trial." This is not a case in which the court either orders or suggests a reduction of the amount of the finding. It is the act of the party in whose favor the finding is. The appellant evidently has in mind cases in which the court, on an application for a new trial, regards the finding

excessive, and gives to the party in whose favor the finding is, his election to remit, or accept a new trial. The distinction is obvious. The judgment is **AFFIRMED**.

CATHERINE WICKE, Appellant, v. IOWA STATE INSURANCE COMPANY.

Notice to Insurer: BY RECORDING MORTGAGE. Recording a mortgage on insured property is not such constructive notice to the insurer as to make its subsequent acceptance of premiums from the mortgagor a waiver of conditions in the policy prohibiting mortgaging without the insurer's consent. Under Code, section 1944, entry by the recorder simply gives constructive notice of the rights of the grantees to persons dealing with reference to the title of the property affected by the entry. (5)

PRACTICE: ADMITTING TESTIMONY AFTER CASE IS CLOSED. Rests within the sound discretion of the trial court. (7)

PRACTICE IN SUPREME COURT: MOTION TO STRIKE: NOTICE. A motion to strike will be overruled where no notice of its filing has been given. (2)

NECESSARY RECITALS IN ABSTRACT NOT SUPPLIED BY BILL OF EXCEPTIONS. A recital in the bill of exceptions, that it contains all the evidence given, received or offered, does not show that the abstract is an abstract of all the evidence; and on such record, such questions, only, as may be determined without reference to the evidence, will be considered. (4)

ASSIGNMENTS OF ERROR TO BE SPECIFIC. An assignment directed against instructions by number, only, and which points out no particular error, is insufficient. (6)

SAME. An assignment, that "the court erred in overruling the defendant's motion for new trial," which motion contains twelve grounds, does not properly raise the question whether special findings have support in the evidence. (6)

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

SATURDAY, JANUARY 27, 1894.

ACTION on two policies of insurance. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

90	4
490	488
90	4
98	573
100	642
90	4
117	733
90	4
129	441
90	4
140	499

Craig, McCrary & Craig, Smith & Clemans and McVey & Cheshire for appellant.

Rickel & Crocker and Davis & Voris for appellee.

KINNE, J.—I. This is an action against the defendant, a mutual insurance company, upon two policies of insurance issued by it. Policy number 34067 was issued to Zabortskey & Loder, on November 12, 1888, for two thousand dollars, on a stock of goods, store furniture, etc., situated in a certain building in Fairfax, Iowa. Policy number 32293 was issued to Joseph Zabortskey for one thousand, five hundred dollars, on the building which contained said goods, and which was used as a dwelling house and store room. These policies were transferred until finally plaintiff became the owner of them. September 10, 1890, the building and its contents were destroyed by fire. It is alleged that, after the fire, the company was duly notified of the loss, and proofs of loss duly made, as required by the policies. Judgment is asked for three thousand, five hundred and fifty dollars, with interest. Attached to the petition is a copy of the policy, the application and by-laws of the defendant. The defenses are, as to the first policy: *First*. Other insurance upon the property, which was concealed from the defendant. *Second*. A violation of the terms of the policy, in permitting the building in which the insured property was, to be used for purposes other than those set out in the application, and which use increased the risk. *Third*. Allowing gasoline to be used upon the premises, in violation of the terms of the policy. *Fourth*. That proofs of loss were not furnished, according to the terms of the policy. As to policy number 32293, the defenses are: *First*. Change of occupancy of the building, contrary to provisions of the policy. *Second*. Use of gasoline in violation of the

terms of the policy. *Third.* Execution of a mortgage upon the insured building, in violation of terms of the policy. In a reply, plaintiff charges that defendant, with full knowledge of all the matters now relied upon as a defense, received and retains the premium notes, and has received and retained assessments provided for by its by-laws, and has thereby waived its right to insist upon such defenses; that the change of use in the building was a mere casual one, which did not increase the risk, and was not the cause of the fire; that gasoline was used only for testing gasoline stoves as it is ordinarily used in the business of selling such stoves, and that such use did not violate the terms of the policy; that the mortgage referred to was executed, and on December 29, 1888, indexed and filed for record, and recorded, as provided by law, and was notice to defendant, who thereafter made an annual assessment upon the then holder of the policy, and owner of the property, which he paid, and that same, as well as the premium note, is still retained by the defendant, which facts are pleaded as a waiver of defendant's right to avoid the policy because of the giving of the mortgage. It is further alleged that, after the defendant had full knowledge of all the matters pleaded by it, it demanded of plaintiff further proofs of loss, and compelled the parties to submit to an examination under oath touching the loss, whereby defendant has waived its right to insist upon its defenses. The defendant denies all the allegations of the reply.

II. Appellee files a motion to strike the amended assignment of errors, the additional reply, and the second amendment to the abstract. All these motions must be overruled, as no notice of their filing was given to appellant. Sup. Ct. Rule, section 52.

III. A motion is made to strike the evidence, because the same has not been preserved by a proper bill of exceptions. We think that the motion is not

well taken, but, in view of what is hereafter said, we need not discuss the question further, or cite authorities in support of our conclusion.

IV. It is insisted that there is nothing in the abstract stating that it is an abstract of all the evidence. We have examined it, as well as the amendments thereto, with care, and find nothing therein indicating that it is claimed to be an abstract of all of the evidence. The only reference thereto is in the bill of exceptions, wherein it is stated: "And the above being all the evidence given, received, or offered on the trial of said cause," etc. There is no doubt that the bill of exceptions contained all of the evidence. But such a statement in the bill of exceptions does not even tend to show that the abstract is an abstract of all of the evidence. We have held that such a statement in the bill of exceptions is not sufficient to show that we have an abstract of all of the evidence before us. *Rice v. Plymouth Co.*, 53 Iowa, 635, 6 N. W. Rep. 23. With this condition of the record, we are limited to a consideration of such questions only as may be determined without reference to the evidence.

V. It is insisted that the court erred in giving the seventh instruction to the jury. It is as follows: "It having been shown by the undisputed evidence that after the mortgage referred to, covering the building insured under policy number 32293, was executed and acknowledged, and duly recorded and indexed in the recorder's office of Linn county, Iowa, the defendant received and accepted from the assured payment of a premium on said policy, which defendant has since retained, the defendant is deemed to have thereby waived the forfeiture of said policy by reason of said mortgage, and you will not consider said mortgage as constituting a defense to said policy, but will find for the plaintiff on that defense." In the application upon which the policy was issued, the assured was asked,

“(12) Is the property mortgaged?” which he answered, “No.” One of the conditions of the policy was: “Should there afterwards, during the life of the policy, an incumbrance fall or be executed upon the property insured, this policy shall be void, until the consent of the company in writing, signed by the secretary, is obtained thereto, and indorsed on or attached to said policy.” In support of the instruction, Code, section 1944, is relied upon. It reads: “The recorder must indorse upon every instrument properly filed in his office for record, the hour when it was so filed, and shall forthwith make the entries provided for in the preceding section [indexing the instrument], except that of the book and page where the record of the instrument may be found, and, from that time, such entries shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument.” By the instruction the jury were told that the filing, indexing, and recording of the mortgage would be constructive notice to defendant that such a mortgage had been executed upon the insured property, and any act of theirs done thereafter must be presumed to have been done with such knowledge. We think this instruction was clearly wrong. The statute makes such a filing notice to all persons of the rights of the grantee thereunder. No rights of the grantee or mortgagee acquired under the mortgage are involved in this action. The mortgagee is not a party to this proceeding; its determination can in no event affect his claim. By the contract of insurance, defendant did not acquire an interest in the property, in the sense that it could control it. Such contracts are purely personal in character. I May, Insurance, section 6. Furthermore, the statute by the language, “all persons,” evidently refers to persons dealing with reference to the title to the land,—those acquiring some interest in it, or lien upon it,—as purchasers, mortgagees, and the like. By its contract,

defendant did not become invested with any title to or lien upon the property, which could render it the subject of constructive notice, under this statute. To so hold, it seems to us, would be a plain departure from the evident meaning and intent of the statute. It would impose burdens on persons having no direct interest in the title of real estate, never contemplated by the legislature. See *Ellis v. Insurance Co.*, 68 Iowa, 578, 27 N. W. Rep. 762.

VI. The jury were instructed upon the question of waiver as follows: "If you find from the evidence that the defendant, at any time after the loss in controversy, acquired knowledge of the fact, if you so find, of the occupancy of the second story of the building as a public hall, and also acquired actual knowledge; if you so find that gasoline was used about the premises, and that there was a mortgage upon the premises, and that, after acquiring actual knowledge of all such facts, the defendant required the then holders of the policies to submit to an examination, and demanded of them that they make additional proof of loss by furnishing bills, and made no objection to the payment of said loss on account of said use of said building, of the increase of risk, the use of gasoline about the premises, or of the existence of the mortgage; that the holders of said policies did submit to such examination, and incurred expense of time or money in order to do so,—then such facts, if you so find, will constitute a waiver of the conditions of the policies as to the use of said building, the increase of risk, use of gasoline about the premises, and of the existence of a mortgage or incumbrance upon the premises." The jury found specially that gasoline was used upon the insured premises; that the insured did not change the use of the building; that defendant knew of the use of gasoline prior to November 13, 1890, and prior to that time knew of the use of a part of the building as a pub-

lie hall; that prior to said time defendant had actual notice of the existence of the mortgage; that on November 13, 1890, defendant demanded of the insured that they go to Cedar Rapids, and submit to an examination, under the conditions of the policies; and that defendant examined them in relation to the loss. In the absence of anything showing that we have an abstract of all of the evidence before us, we must presume that these findings were warranted by the evidence in fact adduced upon the trial. The correctness of this instruction is not questioned by any proper assignment of error. The assignment is directed generally to this and other instructions by number only. No particular errors are suggested or pointed out by this assignment. It is, therefore insufficient. *Blair v. Madison Co.*, 81 Iowa, 318, 46 N. W. Rep. 1093. Whether right or wrong, it was the law of the case, and in the condition of this record, we must presume that the jury followed it, and that the evidence justified their verdict.

One ground of the motion for a new trial was that the special findings of the jury were not supported by the evidence, and were contrary thereto, but there is no sufficient assignment of errors raising the question for our consideration. The assignment, so far as it relates to the special findings, is: "The court erred in overruling defendant's motion for a new trial." As the motion contained twelve grounds, it is needless to say that such an assignment is not in conformity to the statute and rules of this court.

In view of this instruction and the special findings and the presumption that obtains in favor of the action of the court and jury, in the absence of an abstract of all the evidence, it seems to us that the error of the court in giving the seventh instruction is clearly without prejudice. The same may also be said as to some other alleged errors, such as admitting the index book in evidence.

VII. It is said that the court erred in permitting plaintiff, after the case was closed, to introduce testimony as to the expense the insured were to in going to Cedar Rapids, in response to defendant's notice to submit to an examination. The admission of testimony, under such circumstances, is largely a matter in the sound discretion of the court, and we should not interfere, unless it appears that such discretion has been abused. No such case is made here.

VIII. Many of the assignments of error are too general to be considered; others are ruled by what we have already said; and still others we are precluded from considering, in view of the condition of the record heretofore referred to. For the reasons given, the judgment must be **AFFIRMED**.

**CEDAR COUNTY V. WM. SAGER, Insane, Appellant;
SAME V. ROBERT LANE, Insane, Appellant; SAME
V. JOHN GRAY, Insane, Appellant.**

Liability of Insane Person to County for Support: SUIT HOW BROUGHT: PLEADING. Suit to recover from the estate of an insane person sums paid by the county for his support is properly brought in the name of the county; and the auditor need not allege in the petition that the board of supervisors has authorized him to sue. (1)

NO NOTICE THAT BOARD HAS DIRECTED COLLECTION NEED BE GIVEN. No notice of the board's action in directing the auditor to collect the amount due need be given to the insane person or his guardian. (4)

EVIDENCE OF SUM ADVANCED BY COUNTY, WHAT IS. The certificate of the hospital superintendent and notices from the auditor of state are presumptive evidence of the correctness of the sums stated therein, under Code, section 1433, and are competent evidence against the estate of the insane person of the amount paid by the county though they were but recently certified and certified for use in the action against the estate. (3)

CUMULATIVE TESTIMONY, WHEN NONPREJUDICIAL. Where there is competent evidence of the sum due, it is not prejudicial to allow testimony, not strictly competent, which simply aids the court in computing. Any mistake in amount can be corrected on application to it. (3)

Continuous Account, What is. The charges of a state asylum, made at the end of each quarter, form a continuous, open, current account within Code, section 2531, and a break of two years in such charges, caused by the patient's leaving the asylum without authority, during which period, while he spent part of the time at home and part in the county asylum, he remained, at all times, a charge on the county, does not destroy the continuity of the account. (2)

Appeals from Cedar District Court.—HON. J. H. PRESTON, Judge.

SATURDAY, JANUARY 27, 1894.

ACTIONS to recover sums of money paid by the plaintiff for the support of the defendants in the hospital for the insane at Mt. Pleasant. The actions were tried and submitted together to the court, without the aid of a jury, and a judgment was rendered in favor of the plaintiff, and against the defendant, in each case, for the amount demanded, and costs. The defendants appeal.—*Affirmed.*

W. G. W. Geiger for appellants Sager and Lane.

E. M. Brink for appellant Gray.

Sam. S. Wright for appellee.

ROBINSON, J.—The petition in the *Sager case* alleges that the defendant is and has been a charge upon the plaintiff since the year 1879, and that the plaintiff has paid for his support at the hospital for the insane at Mt. Pleasant the sum of one thousand, three hundred and fifty-three dollars and sixty-eight cents, as shown by a bill of particulars attached; that there are funds belonging to the estate of the defendant, in charge of his guardian, sufficient to pay the amount plaintiff has expended, for which judgment is demanded. The petitions in the other cases are similar, excepting as to

the time during which the defendants were supported, and the amounts paid by the plaintiff.

I. Section 1433 of the Code, as amended, provides that the law made "for the support of the insane at public charge, shall not be construed to release the estates of such persons from liability for their support; and the auditors of the several counties, subject to the direction of the board of supervisors, are authorized and empowered to collect from the property of such patients, any sums paid by the county in their behalf, as herein provided; and the certificates from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the sums so stated. If the board of supervisors, in the case of any insane patient, who has been supported at the expense of the county, shall deem it a hardship to charge the estate of any such patient with such cost of supporting the patient, they may relieve such estate or estates from any part or all of such burdens, as may seem to them reasonable and just." The petitions were attacked on the ground that they do not show that the board of supervisors had authorized the auditor to commence the actions. If it be conceded that such authority was required, it was not necessary to set it out in the petitions. The evidence shows that the board of supervisors had directed the auditor to collect the claims of the defendants, and actions for that purpose were properly brought in the name of the county.

II. The first item in the bill of particulars in the *Sager case* is for board, and is dated March 31, 1879. It is followed by other charges, chiefly for board, which were made at the ends of the quarters of a year. The charges in the other cases were made in substantially the same way. The appellants contend that a complete cause of action accrued when each charge was

made; that the charges together can not be regarded as a continuous, open, current account, within the meaning of section 2531 of the Code, and, therefore, that all items charged more than five years before the commencement of the actions are barred by the statute of limitations. It was held in *Kilbourn v. Anderson*, 77 Iowa, 502, 42 N. W. Rep. 431, that charges for services rendered during a long term of years, although at rates of compensation which varied at different times, constituted a continuous account. The same rule has been applied to charges for board, office rent, and care of horse, which accrued from day to day, or monthly, or by the year. *Moser v. Crooks*, 32 Iowa, 172; and in *Wendeling v. Besser*, 31 Iowa, 248, it was said that a claim for the continuous and uninterrupted boarding, lodging, and in other respects providing for, a person, during a period of eleven years, constituted a continuous, open account. We are of the opinion that the charges in these cases constitute accounts, within the meaning of the statute, and that they are continuous, although the charges were made at stated intervals. It is claimed that the account against Sager can not be regarded as continuous from the date of the first item, for the reason that it does not show any charge between the thirtieth day of June, 1882, and the thirtieth day of September, 1884. Sager was not an inmate of the hospital from about the middle of April, 1882, until the seventh day of August, 1884. During a part of that time he was at home, performing some labor on a farm, and, when not there, was confined in the county asylum. He left the Mt. Pleasant hospital without authority, was never discharged, and appears to have been a county charge at all times. In the case of *Gavin v. Bischoff*, 80 Iowa, 606, 45 N. W. Rep. 306, it was held that a break in an account of at least two years' duration prevented its being continuous; but, of the account, the items before the break consisted of

annual charges for labor, and those after the break were annual for the rent of a sewing machine. There was a complete change in the character of the account after the break, and the facts shown are so different from those involved in this case that the two cases can not be regarded as governed by the same rule. In *Tucker v. Quimby*, 37 Iowa, 18, it was held that an account in which there was a break of nearly two years was not continuous; but it appears that the items charged before the break were made in the usual and ordinary business of a blacksmith, while the single item after the break was for the use of a buggy. In the case of *Keller v. Jackson*, 58 Iowa, 630, 12 N. W. Rep. 618, it was held that a break of more than one year and nine months between the items of one side of an account, in view of the fact that all the items had relation to the same continuous and open transaction between the parties, was not such a cessation of dealing as would cause the statute of limitations to commence to run. The case of *Griffin v. Clay Co.*, 63 Iowa, 413, 19 N. W. Rep. 327, decided that claims for compensation due as county treasurer for different terms of service were not in the nature of an account, and is not in conflict with what we have said. We conclude that the account in each case is continuous, and that none of the items are barred by the statute of limitations.

III. In order to prove the amount of payments it had made, the county introduced in evidence certificates of the superintendent of the hospital at Mt. Pleasant, and notices of the auditor of state. The defendants objected to them on the ground that they were not duly certified until a short time before the trial, and for the purposes of the trial, and that they were only competent evidence as between the county and state. We do not think the objections were well founded. The certificates and notices are, by section

1433 of the Code, made presumptive evidence of the correctness of the sums so stated. For the purposes of this case, the fact that the certificates and notices had been but recently prepared is immaterial. We discover no prejudicial error in the admission of the evidence.

IV. The appellants complain that they were not permitted to show that no notice of the action of the board of supervisors in ordering the collection of the amounts in controversy from their estates was served on them or their guardians. Notice of that kind was not required. The law makes the estate of an insane person liable for his support, and it remains so liable until the board of supervisors relieves it by action taken for that purpose. In directing the collection of the charges in suit, the board only directed the doing of what the law enjoined. If the defendants, or anyone interested in their estates, desired the estates to be relieved from such charges, it was their privilege to ask that it be done; but they can not complain that notice of an intention to exercise a right vested and directed by statute was not given.

V. Appellants complain that the court permitted the deputy county auditor to testify what amount had been paid by the plaintiff on account of each defendant. It is shown that the answers the witness gave were not intended as a substitute for competent evidence of the payments made, but merely as an aid to the court in computing the amounts. If the answers were not strictly competent, we are unable to discover in what respect they could have been prejudicial. The competent evidence was before the court, and if, as claimed by appellants, the judgment against Sager was for a small amount more than was actually due, it was evidently so rendered by mistake, and would have been corrected by the district court on proper application, but no application of that kind was made. Whether there was such a mistake is a question not so

presented by the record that we should determine it. The judgments of the district court, so far as they are brought in question, are sustained by the law and the evidence, and are AFFIRMED.

CHAS. H. PALMER, Appellant, v. VIRGINIA M. PALMER
et al.

Action to Recover Personal Property: COUNTERCLAIM IN. In an action to recover specific personal property, both parties claiming ownership, defendant can not use debts due her from plaintiff as an equitable set-off against plaintiff's cause of action, nor make such debts the subject of a cross bill or counterclaim. (2)

EQUITABLE DEFENSES. While equitable defenses may be interposed against an action for the recovery of specific personal property, an allegation that the plaintiff is indebted to defendant on long and complicated accounts, that defendant is liable for part of the price of the property, that defendant put money into the same, that plaintiff is insolvent and has made a fraudulent confession of judgment, presents no such defense, and a motion to transfer to the equity side on account of such alleged defense should be overruled. (3)

WAIVER OF RULING, WHAT IS NOT. Where plaintiff's motion to strike counterclaim and his objections to a transfer to the equity side are overruled and an order made to try the case on depositions and documentary evidence, a subsequent agreement of counsel that such order be vacated and trial had on oral or written evidence as either party may desire, does not waive plaintiff's exception to said ruling. (4)

Appeal from Lucas District Court.—HON. CHARLES D.
LEGGETT, Judge.

SATURDAY, JANUARY 27, 1894.

ACTION for the recovery of specific personal property, of which plaintiff claims right of possession as absolute owner thereof. Defendant answered, denying that plaintiff was owner, or entitled to possession, of any part of the property in question, and alleging that she is the absolute owner, and entitled to retain posses-

90	17
92	109
90	17
97	465
90	17
122	676
90	17
1125	63

sion thereof. She also alleges, by way of cross bill or counterclaim, grounds for equitable relief, and on her motion the case was transferred to the equity docket, and tried as an equity case. Decree was entered against the plaintiff, from which he appeals.—*Reversed.*

Mitchell & Penick for appellant.

Stuart & Bartholomew for appellees.

GIVEN, J.—I. Appellant's first contention is that the court erred in overruling his motion to strike that part of appellee's answer set up as a cross bill or counterclaim, and in sustaining appellee's motion to transfer the case to the equity docket. The following is a sufficient statement of the pleadings and proceedings for an understanding of these questions: Plaintiff commenced this action at law for the recovery of specific personal property, namely, a certain retail stock of merchandise in a store kept by him in Chariton, a safe used in said store, and certain promissory notes and books of account pertaining to said mercantile business; also, a carriage, cart and phaeton. He alleges, as the fact constituting his right to the present possession of said property, that he is the full and absolute owner thereof; that up to August 29, 1889, he was in sole possession of said property, on which day the defendant wrongfully took possession, and has ever since retained the same. In an amendment, plaintiff alleged, in substance, that he purchased the original and all additions to said stock of merchandise with his own money, and carried on business therewith; that said notes and book accounts were for merchandise sold; and that he purchased the other articles mentioned with his own money. He also alleged that he and defendant were husband and wife, that she, having property, had credit on account thereof; that he had no credit, and that defendant being indebted to

him in the sum of two thousand dollars, which she could not then pay, it was agreed that said mercantile business should be conducted in the defendant's name; and that it was so conducted by plaintiff till August 29, 1889, when defendant wrongfully took possession of said property. The defendant filed her answer, in the first nine paragraphs of which she joins issue as to the alleged ownership and right to immediate possession, and alleges that she is the absolute owner of said property, and entitled to retain possession of the same. Following these paragraphs, the defendant sets up "as her cross bill or counterclaim," at great length, numerous business transactions between her and her husband from the time of their marriage, in 1873, to August 1, 1889. She alleges that in 1873 and 1874 she loaned plaintiff money at different times, taking his notes therefor, five of which are set out, and that plaintiff, without her knowledge or consent, has taken possession of the others; that there is two thousand, five hundred dollars due to her on said loans; that plaintiff is insolvent; and asks that said sum "be allowed her as an equitable set-off or counterclaim against any sum which might be found due the plaintiff in this case." She also alleges that plaintiff, as her agent, came into possession of one thousand, five hundred and eighty-two dollars derived from a dairy business carried on by her, one thousand, three hundred dollars realized from the sale of her dairy stock, three hundred dollars or more per year as rent for her farm since 1880, and large amounts from her father's estate. Concerning said stock of merchandise and mercantile business, the defendant alleges that she purchased the original stock for one thousand, seven hundred dollars; that all additions were purchased in her name, and on her credit, and that the plaintiff conducted the business in her name as her agent; that plaintiff attempted to keep an account between them as to all the business in

which defendant was engaged; and that the trial of this case will necessarily involve a careful examination of each and all of these books of accounts, "which will require a long time and great labor, and the services of a careful accountant." After alleging a number of matters which enter into an accounting, defendant states that plaintiff, as agent, received sums of money from Mrs. Bramer, Mrs. Horskins, and Mrs. Meek to invest for them; that he deposited said moneys in bank in defendant's name, with her own money, and drew checks in defendant's name against the account for his own and defendant's use. Defendant also alleges that said merchandise is only worth three thousand dollars; that she is liable for debts growing out of said business to the sum of four thousand, five hundred and eighty dollars and forty-seven cents; that plaintiff is insolvent; and that he has confessed a judgment in favor of his mother, to whom he was not indebted, with the fraudulent intent of enabling his mother to seize the property in dispute if it is restored to plaintiff, wherefore defendant says it would be inequitable and unjust to turn over said property to the plaintiff. Defendant asks that plaintiff's petition be dismissed; that she be confirmed in the title to said property, or, in case anything is found due the plaintiff, that the two thousand, five hundred dollars due defendant on said notes be deducted as counterclaim; that in case the court finds that the plaintiff is the owner of the property, the amount unpaid thereon be ascertained, also the amount of defendant's money that has been used in said business which has not been returned to her; and that a decree be entered, declaring all such sums an equitable lien on said property in favor of the parties holding the same; and that a receiver be appointed. With this answer, defendant filed a motion to transfer to equity, upon the grounds that the issues involve the examination of voluminous accounts extend-

ing over twenty years, that complete relief can not be granted at law, and that the facts stated show that a receiver should be appointed. To this motion, plaintiff filed objections, and also filed his motion to strike all but said first nine paragraphs of the answer. Plaintiff's motion to strike was overruled, and defendant's motion to transfer the case to equity was sustained, to both of which rulings the plaintiff, at the time, excepted. The order transferring the case is as follows: "The court finds and holds that the issue of ownership of the personal property in question, as raised by defendant's answer or cross bill, should be, and is, sent to the equity docket for trial, and to investigate the state of the accounts between the parties, so far as to ascertain whose money or means purchased the said property, and for the discovery of evidence that will elucidate that question, and also for the purpose of ascertaining the amount of indebtedness or liability, if any, of either of the parties to third persons, for or on account of said property."

II. Plaintiff's first contention is that the court erred in overruling his motion to strike that part of the answer setting up "a cross bill or counterclaim," and in sustaining defendant's motion to transfer to equity. The cause of action stated in the petition is to recover specific personal property, as provided in section 3225 of the Code. The issues joined by the first nine paragraphs of the answer are as to ownership and right of possession, and are exclusively law issues. Section 3226 of the Code provides that such actions "shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim." A counterclaim is defined in section 2659 of the Code as follows: "*First*, when the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or, *second*, a cause of action in favor

of the defendants, or some of them against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition, or connected with the subject of the action; or, *third*, any new matter constituting a cause of action in favor of the defendant, or all of the defendants, if more than one, against the plaintiffs, or all of the plaintiffs, if more than one, and which the defendant, or defendants, might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded." It is certainly clear that the part of the answer sought to be stricken out does set up several counterclaims. The claim for two thousand, five hundred dollars, for one thousand, five hundred and eighty-two dollars, for one thousand, three hundred dollars, and for farm rents and money received from the estate are counterclaims. Section 3245 of the Code provides that in actions for the recovery of real property "there shall be no joinder and counterclaim therein, except of like proceedings and as provided in this chapter." In *Rosierz v. Van Dam*, 16 Iowa, 177, it was held that equitable defenses may be interposed in a proceeding at law to recover the possession of land. See, also, *Van Orman v. Spafford*, *Id.* 187, and *Kramer v. Conger*, *Id.* 434. The provisions of the Code as to the recovery of real and personal property are substantially the same in respect to the question under consideration, and are similar to like provisions in the Revision. There is no conflict between subdivision 6, of section 2655, that allows any defense, legal or equitable, and sections 3226 and 3245, that forbid the allowance of counterclaims in actions to recover property. The one permits anything that is defensive to plaintiff's cause of action; the other excludes counterclaims because they are not defensive to plaintiff's cause of action, but a new and different cause of action. *Muir v. Miller*, 82 Iowa, 700, 47 N. W. Rep. 1011, and 48 N. W. Rep. 1032, was an action to recover specific

personal property, in which defendant answered, and set up a cross petition asking relief similar, in some respects, to what is set up and asked in this case. A demurrer was held to be properly sustained to the cross petition, because the relief sought was in the nature of a counterclaim. While we are of the opinion that equitable defenses may be pleaded in an action for the recovery of personal property, and, when pleaded, may be tried as provided in section 2517 of the Code, our conclusion is that the matters set up in this cross bill are counterclaims that can not be allowed in this action, and therefore the motion to strike should have been sustained.

III. We next inquire whether the court erred in transferring the case to equity. We have seen that equitable defenses may be pleaded in actions for the recovery of real property, under authority of said subdivision 6, of section 2655. We see no reason why the same rule should not apply to actions for the recovery of personal property. Said subdivision is as follows: "The defendant may set forth in his answer as many causes of defense, counterclaim, whether legal or equitable, as he may have." The cause of action alleged by the plaintiff is the right to the immediate possession of the property described at the time the action was commenced, by virtue of being then the absolute owner thereof. His right to recover possession rested upon whether he was then the absolute owner, and could not be strengthened or defeated by any changes that subsequently occurred as to the ownership. *Beroud v. Lyons*, 85 Iowa, 482, 52 N. W. Rep. 486; *Muir v. Miller*, *supra*. The answer of defendant that she was then entitled to possession by virtue of being absolute owner was clearly defensive to the cause of action, but the alleged indebtedness of plaintiff to defendant was not. If plaintiff was entitled to possession, it was no defense that he was indebted to defendant. To so hold would permit

a creditor to forcibly seize the property of a debtor without process, and to plead the indebtedness as a defense to an action to recover it back. The question of indebtedness is not a defense in this action, whether the accounts are few and plain, or many and complicated. The only remaining allegation in the answer that can be claimed to present an equitable defense is that part alleging defendant's indebtedness for merchandise, the claims of the three ladies named, the claim of defendant for money put into the mercantile business, and the insolvency of plaintiff, and his fraudulent purpose in confessing judgment in favor of his mother. If, at the commencement of this action, plaintiff was the absolute owner of the property and entitled to possession thereof, the matters alleged did not justify defendant in taking and detaining the property without legal process. Such facts are no defense to plaintiff's cause of action. Each party claims the right to possession by virtue of absolute ownership. The controlling question is, who owned the property. And this depends upon whether the mercantile business was carried on under an agreement as alleged by the plaintiff, and the goods paid for by him, or as claimed by the defendant. This question of ownership involves the inquiry as to which party paid for the goods, but that does not necessitate an accounting. If plaintiff purchased, as he claims, then the property was absolutely his; and if the defendant purchased, as she claims, the goods are hers regardless of the state of the accounts or the rights of other persons. We think the equitable matters set up in the answer are no defense to plaintiff's cause of action, and therefore the motion to strike should have been sustained, the motion to transfer overruled, and the case tried at law upon the issues joined by the first nine paragraphs of the answer.

IV. After the case was transferred, counsel stipulated as follows: "It is hereby agreed that the order

in the above cause that the same shall be tried on depositions and documentary evidence shall be set aside, and the cause shall be tried at the January term, 1889, of the above court, in open court, as an equity cause, before Judge LEGGETT or Judge TRAVERSE, on written and oral evidence, as either party may desire." It is contended that, by this agreement, plaintiff waived his exceptions to the rulings on said motions. Clearly, he waived nothing as to his motion to strike, and, as to the other, the case was already transferred, against his objection; and, being thus in equity, he consented that the order to try on depositions and documentary evidence be set aside, and that the case be tried on written or oral evidence, as either party might desire. This was certainly not intended as a waiver of the exceptions. It follows, from the conclusions announced, that the decree of the district court must be REVERSED.

R. L. CHASE, Cashier, Appellant, v. THE GARVER COAL COMPANY *et al.*

Mechanic's Lien as Against Mortgage: WORK UNDER SEPARATE ORDERS. Where items of repairing are furnished under distinct orders, a lien, against an incumbrancer without notice, will be secured for such items, only, as are furnished within ninety days prior to the filing of the statement for lien, and, also, for all sold under an order given more than ninety days before said filing, if the last item in said order be furnished within the ninety days. (1)

MISTAKE OF LAW IN STATEMENT, EFFECT OF. The fact that the statement for lien, while containing no items which are not liens against the owner, contains such as are not liens against an incumbrancer because sold under an order no items of which were furnished within ninety days of the filing of the statement, will not, in the absence of bad faith, defeat the entire right to lien against the incumbrancer. (2)

Appeal from Polk District Court.—HON. S. F. BALLIETT, Judge.

SATURDAY, JANUARY 27, 1894.

90	25
98	475
90	25
105	968
90	25
106	29
106	425

ACTION in equity to recover the amount due on certain promissory notes made by defendant, the Garver Coal & Mining Company, and other claims, and for the foreclosure of a mortgage executed to secure their payment. The defendant, the Eagle Iron Works, filed an answer and cross petition, in which it claimed to be entitled to a mechanic's lien on the mortgaged property, superior to that created by the mortgage of plaintiff. There was a hearing on the merits between plaintiff and the Eagle Iron Works on the question of priority of claims, which resulted in a decree in favor of the iron works. The plaintiff appeals.—*Modified and affirmed.*

Henry S. Wilcox for appellant.

Callendar & Smith and *H. J. Clark* for appellees.

ROBINSON, J.—The mortgage under which plaintiff claims was executed on the eighth day of May, 1890, to secure an indebtedness which amounted to nearly five thousand dollars, and was recorded on the tenth day of the same month. The statement for a mechanic's lien in favor of the iron works was filed three days later, and alleges that the agreement under which the labor and materials for which a lien is claimed were furnished was made on the eighth day of July, 1889, and that the last of the materials and labor for which a recovery is sought were furnished on the twentieth day of March, 1890. When the mortgage was taken the plaintiff had no actual knowledge that the iron works made any claim for a mechanic's lien on the property mortgaged. The labor and materials in question were furnished to the Garver Coal & Mining Company in repairing its machinery at its mines. There was no general agreement which contemplated the precise repairs which were actually made, but when

repairs were needed, the coal company directed the iron works to make them, and when labor and material were furnished and repairs made at any given time, it was not known what other repairs, if any, would be required. The items making up the account of the iron works were, in fact, furnished at different times, under separate orders. Some of them were furnished in each month commencing in July, 1889, and ending on the tenth day of March, 1890, excepting the month of September. Some of the items were quite small. Thus, in July, 1889, the charge was for one dollar and fifty-five cents for labor and material used in making a roller. Several of the items charged on different days were less than one dollar each. On one date the charges amounted to forty dollars, but that was the largest sum charged at one time. The account is a continuous one, and amounts to two hundred and eighty-three dollars, from which credits for coal to the amount of one hundred and nine dollars and fifty-two cents are to be deducted.

I. The iron works was a principal contractor, within the meaning of the mechanic's lien law, and entitled to ninety days from the time of furnishing the last item of the account within which to file its statement for a lien. Acts, Sixteenth General Assembly, chapter 100, section 6. Therefore, if the repairs can be regarded as having been made under a single agreement as a part of the same transaction, the statement of the iron works was filed in time, and its lien is superior to that of the plaintiff's mortgage. *Evans v. Tripp*, 35 Iowa, 371; *Lamb v. Hanneman*, 40 Iowa, 43. It is not necessary that an agreement for labor and material be expressed, but it may be sufficient if implied. *Neilson v. Railway Company*, 51 Iowa, 185, 1 N. W. Rep. 434. It was not necessary that each item furnished should be specified or contemplated at the time of the making of the agreement (*Stockwell v. Carpenter*, 27 Iowa, 125);

nor that it be understood that the contractor should have a mechanic's lien for what he furnishes. (*Jones v. Swan*, 21 Iowa, 181). It is said that this case is, in its controlling facts, like the one last cited. In that, a lien was sought for work done and materials furnished in repairing old and in making new machinery, from time to time, as required by the owners. A verbal contract under which the contractor was to furnish castings was made about the time the first articles were furnished, but the account extended from the second day of December, 1863, to the twenty-third day of May, 1865. It was held that the contractor was entitled to a lien for the entire account as against a mortgage made and recorded within ninety days from the time the last item was furnished. When the contract was made, some of the items of the account were not contemplated, but were afterwards ordered as it was found that they were required. It will be observed, however, that in furnishing the labor and material thus ordered the contractor acted under the original agreement, and the work was done almost daily. In deciding that case the court said a different rule would obtain "where the work is done under different contracts, or such space intervenes between the different items as to raise the presumption that the work had once ceased, and the contract was completed." In that case, it sufficiently appears that the items which constituted the account were furnished for the improvements originally contemplated, with such changes as were afterward deemed proper, as a part of one transaction. In this case, so far as we are able to discover, the repairs made under one order were entirely independent of all others, not only as to their character, but also as to the time when ordered. There was apparently no special relation between the repairs made at different times. It is true, after the evidence had been submitted, and while the argument was being made, the iron works offered to

recall a witness, and prove that at the time the first labor and material were furnished it was agreed that the iron works should be employed to do any repairs and other work needed in its line, and that it should receive from the coal company fuel for its foundry; but its offer was refused by the court, for the reason that it deemed the evidence introduced sufficient on the proposition sought to be established. The testimony was not introduced, and can not be given weight by us. But, had it been submitted, it would not have changed materially the case made by the record before us. It would only have tended to show an agreement for future employment in case there should be occasion for it, and for taking coal in payment. It does not appear that any special work was under contemplation when the alleged agreement was made, but it is evident that each order for repairs was, when accepted, in effect a separate contract. The repairs appear to have been of such a character as might be constantly needed in a large mining business. While it is true that they are within the scope of the mechanic's lien law, yet we think there is no ground for holding that they were furnished under a single contract as a part of one transaction, which the contractor is entitled to have secured by a single lien as against the plaintiff.

II. It appears that the only materials charged in the account of the iron works which were furnished within ninety days of the filing of the statement for a lien were three sets of coal wheels and axles of the value of twenty-four dollars. Other articles were furnished a short time before, but we are unable to determine from the record that they were supplied under the same order. Payments have been made by the coal company which do not appear to have been applied by the parties to any specific part of the account. Therefore, in accordance with the well established usage in such cases, we will apply them on the items of the account first

charged. The iron works is entitled to a lien paramount to the mortgage of plaintiff for twenty-four dollars and interest. As to the remainder of the claims of the iron works, the mortgage is senior.

III. It is said that the iron works is not entitled to a lien, for the reason that the statement it filed was not just and correct. That it was filed under an erroneous theory as to the rights of the iron works is true, but it is not shown to contain any item for which the iron works was not entitled to a lien as against the coal company. There was no intentional wrong in the statement, and no sufficient reason for applying to it the rule announced in *Stubbs v. Railway Co.*, 65 Iowa, 513, 22 N. W. Rep. 654. The decree of the district court is MODIFIED AND AFFIRMED.

JOHN MEHLHOP, SON & COMPANY, Appellant, v. RAE
& HARKER.

Minor: DISAFFIRMANCE OF CONTRACT. A minor who is a member of a partnership may disaffirm a contract made by his firm without disaffirming the contract of partnership. ROBINSON, J., taking no part.

Appeal from Buena Vista District Court.—HON. LOT
THOMAS, Judge,

SATURDAY, JANUARY 27, 1894.

THE plaintiffs are wholesale dealers in merchandise, and the defendants are a partnership composed of Thomas W. Rae and James Harker. They are retail dealers, and this action was brought against the defendant partnership, and the individual members thereof, for goods sold by the plaintiffs to the defendants. No defense to the claim of plaintiffs was made by the defendant partnership, nor by the defendant Thomas W. Rae. James Harker defended upon the ground

that he was a minor at the time the goods were purchased, and that he disaffirmed the purchase of the goods from the plaintiffs. There was a trial by jury, and a verdict and judgment for the defendant Harker. Plaintiffs appeal.—*Affirmed*.

Henderson, Hurd, Daniels & Kiesel for appellants.

C. A. Irwin and *Wm. Milchrist* for appellee.

ROTHROCK, J.—I. The second count of the defendant's answer is in these words: "Defendant, for further answer, states that he has never been married, and did not attain the age of twenty-one years until the ninth day of October, 1891; that he has not now, and did not have when he attained his majority, within his control, any of the property described in plaintiffs, petition and amendment, and defendant disaffirms all contracts made with the plaintiffs during his minority." The plaintiffs' reply to the answer was as follows: "Plaintiffs admit the allegations of defendant Harker's answer, but state that, before the goods for which this suit is brought were sold to Rae & Harker, said defendant Harker represented that he was then more than twenty-one years of age, and that before said goods were sold, and up to the time this action was begun, said Harker was engaged in business as an adult, and that plaintiffs had good reason to believe him capable of contracting." It will be observed that it is admitted by the pleadings that Harker was a minor at the time the goods were purchased, and the only question in controversy on the trial in the district court was whether, notwithstanding the minority of the defendant, he was liable personally for the goods, by reason of his having represented that he was more than twenty-one years of age before said goods were sold, and whether he was engaged in business as an adult, and plaintiffs had good reason to believe he was capable of contract-

ing. It is claimed in argument, in behalf of appellants, that the defendant ought not to be allowed to disaffirm the transaction with the plaintiff without also disaffirming the partnership contract, as between himself and Rae. The sufficiency of the defendant's answer was not attacked, by demurrer or motion or otherwise, in the court below, and it would seem that some such action was required, to raise the question now presented. However, without determining that question, we think the objection is not well taken. The contract of partnership existing between the individual members thereof, and the contract which the law implies between the members and a creditor of the partnership, are quite distinct. We think it is very clear that a minor may well disaffirm one of these contracts without disaffirming the other. It is provided by section 2238 of the Code that "a minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control, at any time after his attaining his majority." And section 2239 is as follows: "No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting." It does not appear that any of the partnership property of the partnership remained in the control of the defendant after he attained his majority, and the supposed equitable considerations urged in argument do not appear of record. Besides, the contention is, in effect, that a minor may not disaffirm one contract without disaffirming another. The statute is explicit. The right to disaffirm the contract of personal liability is absolute, and does not depend upon any other consideration than

the obligation of that contract. *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. Rep. 109. We have examined the case of *Miller v. Sims*, 2 Hill (S. C.) 479, cited by counsel; and, while it may be a proper construction of the statute of South Carolina, it does not appear to us to be applicable, under our laws.

II. There was a conflict in the evidence upon the questions in issue, as to whether the defendant should be held liable to plaintiffs by reason of misrepresentations as to his majority, and, whether from his having engaged in business as an adult, the plaintiffs had good reason to believe him capable of contracting. As we read the evidence, there was a clear preponderance in favor of the defendant. However that may be, we are clearly of the opinion that the issues of fact in the case were fairly presented to the jury in the instructions of the court. It is true that exceptions were taken to the refusal to give certain instructions requested by plaintiffs, and to instructions given by the court on its own motion. We discover no error in this respect, and we think these objections do not demand special consideration. The judgment of the district court is **AFFIRMED**.

ROBINSON, J., took no part in the decision of this case.

ARCHIE COSNER V. CITY OF CENTERVILLE, Appellant.

Contributory Negligence: NEEDLESSLY ATTEMPTING UNSAFE PASSAGE. Plaintiff can not recover for injury by falling on an icy sidewalk, though he was careful in passing over it, if the teamway in the road, parallel to the sidewalk, was safe and could have been used by him. (1)

NON PREJUDICIAL INSTRUCTION. A charge that a city is liable if it allows accumulations of ice and snow to render its sidewalks unsafe for passage, is erroneous; but a modification that it is entitled to reasonable time to remedy a defect after it knows, or should have known, of it, cures the error. (2)

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Appeal from Appanoose District Court.—HON. H. C. TRAVERSE, Judge.

MONDAY, JANUARY 29, 1894.

ACTION to recover for personal injuries alleged to have been caused by the negligence of defendant in permitting snow and ice to accumulate on one of its sidewalks. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.—*Reversed.*

T. M. Fee for appellant.

L. C. Mechem and *Geo. D. Porter* for appellee.

ROBINSON, J.—The plaintiff fell on a sidewalk of the defendant on the twelfth day of January, 1891, and received the injuries of which he complains. There is much conflict in the evidence in regard to the place where he fell, and in regard to the condition of the walk. The plaintiff contends that the place of the accident was six or eight feet south of a street which extended from east to west, on a walk which extended from south to north, on the west side of an intersecting street, and that the walk at that place was entirely covered with ice, which was five inches thick in one place, and thinner at the edges; that it had been there in substantially the same condition for several days; that it was originally a snowdrift, which was formed at the corner about the first of January, and extended lengthwise of the walk, and had never been removed. The plaintiff is corroborated as to these matters by several witnesses. Numerous witnesses on the part of the defendant testify that the place of the accident was thirty or more feet further south than the place designated by the plaintiff, and that there was no ice on the walk at the time of the accident, neither at the place fixed by

the plaintiff, nor at that fixed by witnesses for the defendant, excepting sleet which had fallen the night before. There was a fair conflict in the evidence in regard to those matters, and it was within the province of the jury to determine the facts. We think they were authorized to find that they were as claimed by the plaintiff. But it is said that the evidence shows clearly that the negligence of the plaintiff contributed to the accident. The place of the accident was at the corner of the lot on which plaintiff resided, and within two hundred feet of his house. His customary route to and from his place of business was over that spot, and he had passed over it twice each day, excepting Sunday, for several days. He states that its condition was about the same Monday morning, when he fell, that it was Friday and Saturday of the preceding week, excepting that the ice had thawed some on Saturday. The plaintiff had been a cripple for some years, and was unable to walk without crutches. He could not balance himself on his feet, and, when he moved, he rested his weight on his crutches, and drew his legs after him. He knew the ice was there when he left his house, and saw it when he reached it, and before he put his crutches upon it. After he put his crutches upon it, his feet slipped, and the accident occurred. If the walk was in a dangerous condition, he was as fully informed of the fact as the defendant could have been, and must have known that it was dangerous for him to attempt to pass over it. But whether he was negligent in what he did depends upon the necessity for making the attempt, and the care he used. The mere fact that the sidewalk was unsafe would not defeat his recovery. *Byerly v. City of Anamosa*, 79 Iowa, 206, 44 N. W. Rep. 359; *Walker v. Decatur Co.*, 67 Iowa, 308, 25 N. W. Rep. 256; *Rice v. City of Des Moines*, 40 Iowa, 642; *Hartman v. City of Muscatine*, 70 Iowa, 511, 30 N. W. Rep. 859. But, in the case last cited, it was said of one who had been

injured in attempting to pass over a dangerous part of a street that "if, knowing it was dangerous, he knew or ought to have known that it was not prudent to walk over the crossing, and down the slope, and there was another way he could have taken without material inconvenience, then he can not recover." The cases of *Parkhill v. Town of Brighton*, 61 Iowa, 108, 15 N. W. Rep. 853, and *McGinty v. City of Keokuk*, 66 Iowa, 726, N. W. Rep. 506, announced the same doctrine. The plaintiff claims that there was no other way to his place of business than the one over the ice, and that, when he fell, he was using all the care possible. But the admitted facts do not sustain those claims. The street in front of his house, and parallel with the sidewalk, was used by pedestrians when the walk was slippery, and could have been used by the plaintiff. He could only walk where it was smooth, but he does not show that the street was rough, nor that there was anything to prevent his walking in it in safety. There was a shallow ditch at the side of the road, which the plaintiff describes as "a little gutter;" but, so far as was shown, it was nothing which he could not have crossed easily. Ordinarily, the question of contributory negligence is for the jury to determine, but the burden of proving himself free from such negligence was upon the plaintiff. *Fernbach v. City of Waterloo*, 76 Iowa, 599, 41 N. W. Rep. 370. It may be, as he claims, that he was using due care when in the act of attempting to cross the ice, but he failed to show any sufficient reason for making the attempt, and the jury were not justified in finding that he had used due care.

II. The appellant criticises the seventh paragraph of the charge, because it instructed the jury that "if ice or snow is suffered to remain upon a sidewalk in such an uneven and rounded form that a person can not walk over it, using due care, without danger of falling down, that constitutes a defect for which the city is liable."

As an independent statement of the law, that portion of the charge would have been erroneous, but it was qualified by the statement that the city was entitled to reasonable time after the defect was known to it, or should have been so known, within which to remove it. As modified, we think the paragraph quoted was not prejudicial to the defendant. What we have said disposes of all questions we are required to determine on this appeal. For the reasons shown, the judgment of the district court is REVERSED.

WEBSTER-GRUBER MARBLE COMPANY, Appellant, v.
MARY DRYDEN *et al.*

Contract to Sell a Particular Thing: SUBSTITUTION OF ANOTHER.

Defendant agreed to buy a particular monument, represented to be perfect. Thereafter, she refused to take it because of an alleged flaw in one of the stones. To avoid this objection, plaintiff, without the consent of defendant, substituted a flawless stone. *Held*, that defendant, having failed to deliver the thing contracted for, could not recover on the contract.

Appeal from Louisa District Court.—HON. A. R. DEWEY,
Judge.

MONDAY, JANUARY 29, 1894.

THE defendants signed and delivered to the plaintiff the following instrument:

“\$450.00.

No. ———.

“MORNING SUN, IOWA, Nov. 26, 1890.

“I have this day bought of the Webster-Gruber Marble Company, to be delivered at Virginia Grove Cemetery during the month of December, 1890, or within a reasonable time thereafter, one combination Georgia sarcophagus monument, design No. ———, selected, now in stock. * * * For the material, work, and labor as performed above, I promise to pay the Webster-Gruber Marble Company, or order, on

delivery of the above work, four hundred and fifty and 00-100 dollars, and reasonable attorney's fee in case action is commenced hereon; and I also agree that I will not countermand this order. It is also agreed that the Webster-Gruber Marble Company shall have full control of said work until fully paid for. It is hereby also expressly agreed and understood that the foregoing embodies all the agreements made between us in any way. I hereby waive all claims of verbal agreements of any nature not embodied in this order. The above sum to draw interest at eight per cent. per annum from time of delivery.

"MARY DRYDEN,

"SARAH A. MUNSHOWER,

"LAURA O. HENDERSON."

The defendants refused to receive the monument, or permit it to be erected, and this action is to recover the contract price. At the close of the testimony the defendants moved the court to direct a verdict in their favor "upon the facts as disclosed," which the court sustained, and from a judgment the plaintiff appealed. —*Affirmed.*

Jayne & Hoffman and L. A. Reiley for appellant.

Blake & Blake for appellees.

GRANGER, C. J.—It will be seen, by reference to the written contract, that it was for the particular stone then in stock and selected. The contract was signed at the home of Mrs. Dryden, and none of the defendants had seen the stone, nor did they have any knowledge of it, except through the agent of the plaintiff company who solicited and obtained the order. A defense to the action is based on misrepresentations as to the character of the stone specified. The day after the contract was signed Mrs. Dryden went to the shops of plaintiff, in Muscatine, and she was shown the mon-

ument designated in the contract, and she declined to receive it, because it contained a flaw, and was imperfect. She looked over the stock, and found a three hundred and fifty dollar monument that she liked, and wanted to change the order and take that. The company declined to make the change, but consented to make changes in the order so that the amount of the purchase should not be reduced. She declined to receive any but the three hundred and fifty dollar monument, and on the next day notified the company in writing that she would not accept the monument specified in the agreement. The secretary of the plaintiff, who was the agent with Mrs. Dryden at the shops, says in his evidence that when the notice was served there had been no work done toward lettering the monument. He says also that the flaw she complained of was not really a flaw, but "I told her we would make it all right; * * * that we would get another stone to replace the one she objected to; * * * that we wanted to make it satisfactory to her, and I told her we would try to do so; * * * told her we did not propose to sell her an imperfect monument." Thereafter the plaintiff proceeded with the contract on its part by putting in a foundation at the grave, and putting thereon a base stone properly lettered. This base stone was the one forming a part of the monument shown Mrs. Dryden at the shops. The plaintiff proceeded to complete a monument of the kind contracted for, and to that end, and to avoid the complaints as to imperfections, it ordered other stones from the quarries in Georgia, polished and lettered them to conform to the contract, shipped them to the cemetery, and would have put them in position but for the interference of the defendants, who had already moved the base and a part of the foundation placed there by plaintiff, and had secured another monument, that was in position. It may be well to here state that the record nowhere

indicates that the defendants ever authorized, by word or act, any change in the contract, as from the stones in the monument when bought, to others, to avoid the objections, and a ground of defense is that the monument that plaintiff attempted to place in position was not the one purchased. As to what we regard as controlling facts in the case there is no dispute, and they are substantially as follows: A particular monument was purchased, of which complaint was afterward made, and there was a refusal to accept it as it was, or with other stones, that would remove the flaws which were the grounds of objection. Plaintiff, with a view to enforce performance on the part of defendants, did the work and incurred the expense necessary to comply on its part. It, however, used other stones for the part of the monument above the base, and we are to say whether such a compliance will authorize recovery for the contract price. It is a case in which the parties are especially relying on their legal rights. We are satisfied that, before seeing the monument, defendants did not intend to take it if they could avoid it. We are also satisfied that plaintiff, while willing to make changes that would be of no detriment to it, would not do more, and insisted on every advantage the contract gave. Did the contract authorize the change made? We think not. It was not a purchase of a monument of a particular kind, but a purchase of a particular monument of a particular kind,—one in stock, selected. If the stones were imperfect there was no sale, for it is agreed that the intention was to sell a perfect monument. The sale of an imperfect monument for a perfect one would not be a sale of one that was perfect of the same kind. It was the sale of a particular article. If the monument was not imperfect the plaintiff had the right to perform its contract, and recover, but it must perform by delivering the particular thing purchased. If it was imperfect, then the

order was obtained by misrepresentation, and conferred no rights upon plaintiff. So that in either event, whether the change was made to avoid an unfounded complaint as to flaws or to remedy an actual defect, the result is the same. In the case of an actual defect it was the plaintiff's duty to treat the contract as of no force. In the other case it was its duty to disregard complaints, and deliver the article sold if it designed a legal enforcement of its rights. The contract provides that the defendants will not countermand the order. Appellant places much reliance on that particular provision, and refers to the case of *McAllister v. Safley*, 65 Iowa, 719, 23 N. W. Rep. 139. With our disposition of this case, that one has no applicability. The holding there is that an unconditional contract for the delivery of a monument gives no right of rescission. Plaintiff's right of recovery is not denied on the ground of a rescission of the contract by defendants, but on the ground of nonperformance on its part. There are some complaints as to the admission of testimony, but no disposition of them could affect the conclusion we reach, and it is not important to consider them. The judgment is AFFIRMED.

ELIZABETH WEST, Appellee, v. ISAAC WEST and
FLORENCE WEST.

TRIAL DE NOVO: NO MODIFICATION FOR PARTY NOT APPEALING. While this court will, on the trial of an equity cause on appeal, examine the whole record to determine the decree that should be entered, and while the findings of the district court are no limitation upon its course of procedure, yet, where one party against whom some issue was found indicates by not appealing that he is satisfied with the judgment, it will not be modified in his favor. (2)

REFORMATION: EVIDENCE. Facts stated, and held sufficient to warrant the reformation of a deed made by an old and infirm mother to her son. (3)

90	41
92	399
90	41
99	41
90	41
123	634

Appeal from Decatur District Court.—HON. W. H. TEDFORD, Judge.

MONDAY, JANUARY 29, 1894.

ACTION in equity to reform a deed. Judgment and decree for plaintiff. Defendants appeal.—*Affirmed.*

McIntire Bros. & Jamison and *C. W. Hoffman* for appellants.

E. W. Curry and *Harvey & Parrish* for appellee.

KINNE, J.—I. The conceded facts in this case are that on and prior to April, 1888, plaintiff was the owner of seventy-seven acres of land in Decatur county, Iowa; that plaintiff is the mother of defendant Isaac West; that said defendants are husband and wife; that on and prior to April 1, 1888, plaintiff was indebted to her son, Jefferson West, in the sum of four hundred dollars, which she desired to pay; that she had offered to dispose of this land to her son, Charles West, if he would pay this debt; that on April 21, 1888, plaintiff executed to defendant Florence M. West a warranty deed for the land; that defendant Isaac West paid the four hundred dollars to his brother, Jefferson West, for his mother; that defendant entered into possession of the land, and tilled the same, and, through his wife, has ever since been in possession of it. The deed contained this provision: "The grantor reserves one half of all crops raised on the land until her death, at which time the title shall fully revert to said Florence M. West." Plaintiff claims that she never signed the deed containing said provision; that same, including her signature and the acknowledgment, was forged. She also claims that the provision heretofore set out, and which is found in the deed introduced in evidence, was not the real contract of the parties, and that same

was fraudulently written in said deed without her knowledge. She prays that the deed be reformed in accordance with the real agreement of the parties. Defendants deny the forgery alleged, deny that the provision referred to was fraudulently inserted in the deed, and claim that the deed, with said provision, is as it was originally drawn, and that same expresses the agreement of the parties as in fact made. The court below found against the plaintiff as to the claim of forgery, and against the defendants as to the fraud, and reformed the instrument by striking out the provision heretofore referred to, and inserting in lieu thereof the following words: "And the said grantor reserves the entire and absolute control of the above described premises until her death." Judgment was entered against plaintiff for costs of all witnesses who were called upon the question of forgery alone, and against defendants for all other costs. No exception was taken by plaintiff, but defendants excepted, and appeal from so much of the judgment and decree as is against them.

II. Counsel say but little upon the question of the forgery, upon which the court below found against plaintiff. It is, however, contended on the one hand, that the case is here for trial *de novo*, and hence we must consider that question, though plaintiff has not appealed from the finding and judgment against her. Appellants contend that, not having appealed, the plaintiff is concluded from questioning the correctness of the court's holding against her. We have held that, "on the trial of an equity case on appeal, this court examines the entire record, to determine the decree that should be entered, and the findings of the district court are no limitation upon its course of procedure. It considers the case anew, and directs judgment in accord with its finding, except that, where one party indicates, by not appealing, that he is satisfied with the judgment, it will not be modified in his favor. *Smith*

v. Knight, 88 Iowa, 257, 55 N. W. Rep. 196. As the above case fully discusses this question, we need not further consider it. We have, however, examined this branch of the case, and are fully satisfied with the finding of the district court thereon.

III. The plaintiff's claim is that the contract between her and her son Isaac was that he should pay the four hundred dollars, and she would deed him the land, she to have the full and absolute control of the land during her natural life. Perhaps the rule as to the character of the evidence required in cases of this kind is the most strongly put in *Cummins v. Monteith*, 61 Iowa, 541, 16 N. W. Rep. 591, where it is said that the evidence "must be clear, satisfactory and conclusive." See, also, *Gelpcke v. Blake*, 15 Iowa, 387; *McTucker v. Taggart*, 29 Iowa, 479; *Harvey v. Savery*, 48 Iowa, 319; *Clute v. Frasier*, 58 Iowa, 268, 12 N. W. Rep. 327; *Strayer v. Stone*, 47 Iowa, 336; *Wachendorf v. Lancaster*, 61 Iowa, 509, 14 N. W. Rep. 316, and 16 N. W. Rep. 533; *Hunt v. Gray*, 76 Iowa, 272, 41 N. W. Rep. 14; *Stewart v. McArthur*, 77 Iowa, 162, 41 N. W. Rep. 604; also, *Presbyterian Church v. Logan*, 77 Iowa, 326, 42 N. W. Rep. 310. A learned writer says: "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error." 2 Pom. Eq. Jur., section 859. We can not enter into a detailed discussion of the evidence in this class of cases. We can only refer to a few matters which stand out prominently in the testimony, and which we think are quite conclusive in plaintiff's favor. On her behalf, and fully corroborating her claim that she was to have the use and control of the land during her natural life, there is the testimony of Jefferson West and one Fierce as to the statements made by Isaac West, before the deed was made, as to what the contract was between him and plaintiff. One of these

conversations occurred on the day the deed was signed. No one attempts to contradict these witnesses as to what the contract was, except Isaac West, and his testimony touching that matter is in some respects unsatisfactory and evasive; besides, he was impeached. There were several witnesses who testified to loose and random conversations had with the plaintiff after the deed was executed, wherein it is claimed she admitted that the contract was that she was to take half of the crops during her lifetime. Some of these witnesses were impeached; others did not claim to be accurate in the recollection of what was said; and still others had the conversation referred to with plaintiff under such circumstances as render it more than probable that they did not distinguish between what plaintiff said the deed contained as drawn and what should have been in it. Again, it is admitted by defendant Isaac West, and established by other evidence, that plaintiff, as early as May, 1888, and about a month after the deed was executed, was insisting that the deed was wrong, and he says, and the evidence shows, that she complained about it from that time on. If that be true, it is inconceivable that at the same time she should be admitting in these random conversations facts directly in conflict with her claim. In view of admitted facts and the other matters we have referred to, it is fair to conclude that these witnesses were mistaken. We have, then, the contract as claimed by plaintiff, established by her own testimony, also by Jefferson West and Fierce. Defendant Isaac alone denies it, and, as we have said, he was impeached; furthermore, his conduct after the execution of the deed is not that of a man conscious of the rightfulness of his acts. Again, the relationship and surroundings of these parties must be taken into consideration, and this is well stated by the learned district judge in his opinion filed in this case. He says: "Again, the defendant was a strong, vigorous, intelligent man,

of nearly thirty years of age, and the plaintiff, his mother, was nearly seventy years of age, subject to heart disease, and quite unwell the day the deed was made. The parties were not on equal footing. The son should have realized this. Did he? Let us see. He takes her to an old justice, nearly eighty years old, a man much more feeble than his mother. And, in my opinion, he had the justice write out the deed before the mother signed. I don't think she ever read it. I think she is mistaken there. But with these two old people he easily succeeded. It would be natural for the old justice to write down what defendant told him, and for the mother to sign it, relying on her son Isaac to do what was right by her. Then, after he gets the deed, he seems to conceal it, and acts in a way utterly at variance with honesty of purpose. Says to parties that 'he got the old lady,' meaning his mother. He calls his mother a 'hell cat,' because she is dissatisfied, and goes so far as to threaten poor old Ross, the justice, with death, if he asks to look at the deed. In short, the evidence does not show the defendant to be a model character. Then, again, this land can not be worth less than one thousand dollars. The defendant has invested but four hundred dollars. His mother is old, and may die at any time. He may get the one thousand dollar farm for four hundred dollars. But let her live out the expectations of one at her age; even then the defendant will have a rich reward for his investment. He can not claim to have been wronged. He has a good bargain." Now, it is insisted that the evidence in this case is not sufficient, to warrant a decree reforming this deed. Evidence may be said to be "satisfactory" when it satisfies "an unprejudiced mind, beyond a reasonable doubt." It must be such as to so convince him "that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest." 1 Greenl. Ev., sec. 2.

Again, it is defined as "that which is sufficient to induce belief that the thing is true; in other words, it is credible evidence." Black, Law Dict., p. 1063. See, also, 1 Rice, Ev., p. 11. Evidence is sometimes said to be "conclusive" when the law does not permit it to be contradicted. *Id.*, Black, Law Dict., p. 242. The word "conclusive," as used in some of the decisions of this court, relating to the character of evidence necessary in cases where it is sought to reform an instrument for fraud or mistake, is certainly not used in the sense contended for by counsel. As used in the cases relied upon by counsel, it means that measure or degree of proof which produces in the unprejudiced mind the belief and conviction of the truth of the fact asserted, having in view all the facts and circumstances surrounding the transaction. A fact thus established may be said to have been proven by testimony which is clear and satisfactory, within the definition above quoted from Greenleaf. Having in mind this required degree of proof, it seems to us, in view of all the facts disclosed by this record, that plaintiff has made such a case as justified the decree of the district court reforming this deed. **AFFIRMED.**

NATIONAL STATE BANK *et al.*, Appellants, v. C. F. BOESCH & SON *et al.*

Judgment on Pleadings: WHEN AFFIRMED. Though the pleadings fail to show a fact the averment of which is essential to the granting of a motion for judgment thereon, but such fact is proven without objection, a just judgment, not shown to be erroneous, granting such motion, will be affirmed.

Appeal from Des Moines District Court.—HON. J. M. CASEY, Judge.

MONDAY, JANUARY 29, 1894.

ACTION, aided by attachment to recover the amount of certain promissory notes. The writ of attachment

90	47
107	580
90	47
110	518
90	47
127	137
90	47
136	112

was levied upon a stock of merchandise and upon real estate. A receiver was afterwards appointed to take charge of the attached property, who entered upon the discharge of the duties of the receivership. At a subsequent date, certain creditors of the defendants, C. F. Boesch & Son, filed a petition, in which they claimed, and sought to have established, an interest in the property which had been delivered to the receiver. A motion of the appellees for judgment on the pleadings was sustained, and the creditors appeal.—*Affirmed.*

A. M. Antrobus, Kelley & Cooper, Thos. Hedge and W. W. Dodge for appellants.

John C. Power for appellees.

ROBINSON, J.—This action was commenced on the sixteenth day of May, 1885, to recover of C. F. Boesch & Son the sum of fifteen thousand dollars, and the writ of attachment was levied on the same day. Two days later, the plaintiff, the National State Bank, filed an application for the appointment of a receiver, based on the grounds that, before the levy was made, C. F. Boesch & Son executed, or attempted to execute, a large number of mortgages upon the attached property; that Theo. Guelich, claiming to represent many, or all of the mortgagees, was claiming the right of possession of the property, and that Schramm & Schmiegl had sued out a writ of attachment, and placed it in the hands of the sheriff for service. Guelich and others were made defendants, and were asked to set forth their respective interests. The application further asked that the receiver take possession of, and dispose of, the attached property to the best advantage of the interested parties. R. M. Raab, was appointed receiver on the day the application was made. In July, 1885, he was authorized to sell the stock of merchandise. On the twenty-fourth day of September he filed a

report, showing a sale of the stock, and a list of the real estate in his charge. September 30 he was authorized to pay taxes on the real estate, and to collect, by suit, claims due C. F. Boesch & Son. In April, 1886, he submitted another report. In July he was required to distribute the money in his hands, which amounted to nearly thirty thousand dollars, according to directions given, of which sixteen thousand, four hundred and sixty-two dollars and forty cents were paid to the National State Bank, and the other payments ordered were made. On the fourth day of October, 1887, the receiver made what is termed a "final report," in which he stated that he had no further duties to perform, and asked to be discharged. The report stated that he had a small sum of money on hand, which, with certain books of account, he had brought into court, and deposited with the clerk. The record before us does not show any formal order discharging the receiver. It shows, however, that on the eighth day of December, 1887, the appellants Lee, Tweedy & Company filed a petition, in which they alleged that C. F. Boesch & Son were indebted to them, and asking the appointment of a receiver. In December, 1888, a report was filed by one S. J. Eads, as receiver, in which he stated that he had in his hands assets of the defendants, and asking an order disposing of them; but whether action was taken on the report is not shown. On the first day of June, 1888, Lee, Tweedy & Company, and other creditors of C. F. Boesch & Son, filed a petition, which was amended in March, 1889, in which they stated the appointment of Raab as receiver; that their claims had been presented and were then pending; that the receiver had, in September, 1885, reported that he had in his charge certain lots in the city of Burlington; that on the fifteenth day of May, 1885, C. F. Boesch & Son had

executed mortgages for some of the lots to Chris Wagner, Carl Busse, Mary Moehn, George Voss, J. Tausman and Chris Wischmeier; that the mortgages were fraudulent, and had been foreclosed without the consent of the court which had appointed Raab as receiver, and the property sold to the mortgagees; and that the mortgages were clouds upon the title to the property in the hands of the receiver. The petition asked that the mortgagees named be made defendants, and required to show their interest in the property; that it be decreed that they have no interest in it, and that Raab, as receiver, be directed to sell the property, and pay the claims of the petitioning creditors. Busse, Wischmeier and Tausman appeared and filed an answer in July, 1889, in which they alleged that each had an interest in parts of the lots in controversy, acquired by mortgage executed before the levy was made; that by virtue of decrees of the court they became the purchasers of the lots which they claim, and have deeds for them; that the receiver, Raab, was authorized to appear in the proceedings to foreclose the mortgages, but had failed to do so, and is now estopped to claim any interest in the property. Each defendant asked that his title to the property be quieted.

In October, 1889, Raab filed a statement in which he alleged that in December, 1885, the plaintiff filed its petition in court for the purpose of settling the conflicting claims of persons who had commenced actions against C. F. Boesch & Son, and who claimed to have any lien on the property; that the persons who had commenced such actions, and who made such claims, including Lee, Tweedy & Company, and the creditors who have joined in their petition, were made parties to the action; that all matters which the creditors now seek to have adjudicated were determined in that action; that the receiver was ordered by the court to pay the rents derived from the real estate in controversy to

Burg & Zaiser, and to surrender the real estate to the parties who claimed it; that he was ordered to make a final statement of such matters as remained in his hands, and deposit the same, and, when that was done, he should be finally discharged; that he conformed to the order of the court in all respects, and made a final report, and supposed that by virtue of the decree, and what he had done under it, he was discharged from all further duties without the order of the court. He asked that he be protected as the officer of the court. In July, 1890, Busse, Wischmeier, and Tausman filed a motion asking for judgment on the pleadings, "because it appears therefrom that petitioners are not entitled to maintain the suit, or the relief prayed for." In November, 1891, the court, after noting the appearance of the several parties in interest by their respective attorneys, made an entry as follows: "And the court, having heard the evidence introduced and the argument of counsel, finds that on the eighteenth day of May, 1885, R. M. Raab was by the circuit court of Des Moines county, Iowa, appointed receiver of all the real and personal property of C. F. Boesch & Son and C. F. Boesch; that said receiver accepted the appointment, and from time to time reported his action and doings as such to the court, and finally, in 1887, said receiver was duly relieved of his trust, and discharged by the court from any further services as such receiver, he having fully accounted to the court for all amounts received by him, or for which he was chargeable; and that said receiver had been so discharged before the petitioning creditors in this case gave notice or filed their petition. It is, therefore, ordered and adjudged by the court that said motion be, and is hereby, sustained, and that the petition and amended petition of the creditors be dismissed. * * *"

The appellants contend that the court was not authorized to ascertain any fact excepting from the

pleadings, and that there was no evidence in the pleadings that the receiver had been discharged. It is true, the pleadings do not show his discharge; but the record of the final order and judgment shows that the court, for some reason, heard evidence on the motion, and, so far as is disclosed, without objection from appellants. An exception to the finding, order, and judgment was noted, but the introduction of evidence was apparently satisfactory to all parties. The abstract submitted does not purport to show all the proceedings in the case, and we are required to indulge in such reasonable presumptions, not in conflict with the record submitted, as are necessary to sustain the findings and judgment of the court. See *McCue v. County of Wapello*, 56 Iowa, 698, 10 N. W. Rep. 248. The judgment record indicates that, on the hearing of the motion, the material question was whether the receiver, Raab, had been discharged, and that evidence was introduced for the purpose of showing the fact. The inquiry was not authorized by the motion, which was based upon the pleadings alone; but as the right of the petitioning creditors for relief was dependent upon the receivership, and could not be enforced in this action if the duties of the receiver had been fully performed, and he had been discharged, the parties in interest may well have agreed to permit the court to determine, from the evidence offered, the fact in regard to the termination of the receivership, and to make the ruling on the motion depend upon that determination. The record does not show that such an agreement was entered into, nor what evidence was heard; but, as evidence was offered without objection, we must presume that it was so offered, by agreement or consent of the parties, for the purpose of influencing the ruling on the motion. As no objection was made to that method of procedure in the district court, none can be given weight in this court. Although the record does not seem to disclose

all the evidence offered, yet it contains enough to indicate that Raab, as receiver, had discharged all the duties which he was required to perform by the court, that he had made a complete accounting, paying the claims of the National State Bank in full, and disposed of all the funds and other property in his hands according to the directions of the court. His receivership, and the action in which he was appointed, seem to have been at an end for all practical purposes. Another receiver had been appointed, but apparently in another case, for property which Raab never had in his possession. The judgment of the district court, accomplishes a just result, and is not shown to be erroneous, as applied to the case, which, for reasons stated, we must presume was submitted to that court. It is, therefore, **AFFIRMED**.

GEORGE PHELPS, Appellant, v. THE DISTRICT TOWNSHIP OF SUMMIT *et al.*

School Districts, Contracts with: RATE OF INTEREST. School orders can not draw more than six per cent. interest. Where they are issued bearing ten per cent., and payments are made on them, and the balance due is renewed at six per cent., the sum due is to be found by computing the original principal sum at six per cent. and subtracting all payments made.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

MONDAY, JANUARY 29, 1894.

ACTION to recover the balance alleged to be due on two school district orders. The defendants answered the petition. There was a demurrer to the answer, which was sustained. The plaintiff excepted to the ruling on the demurrer, and judgment was rendered as prayed in the answer. Plaintiff appeals.—*Affirmed*.

Ernest C. Herrick for appellant.

J. L. E. Peck for appellees.

ROTHROCK, J.—The facts set up in the answer are, in substance, as follows: In the year 1875 the board of directors of the district township of Summit invited bids for the erection of a schoolhouse by a notice to contractors, which was in these words:

NOTICE TO CONTRACTORS.

“Notice is hereby given that proposals for the erection of a schoolhouse in district township of Summit, in the county of O’Brien, will be received by A. J. Edwards at the auditor’s office in Primghar, where plans and specifications may be seen until 1 o’clock P. M., May 20, 1875, at which time the contract will be awarded to the lowest responsible bidder; the board reserving the right to reject any and all bids.

“JOHN F. HOLLIBAUGH,

“Sec. Dist. Tp. Summit.”

The contract for the building of the schoolhouse was let to Stewart & Stevenson in pursuance of the above notice, and a written contract was entered into between the directors and the contractors by which it was stipulated that the school district orders to be issued for the erection of the schoolhouse should bear interest at the rate of ten per cent. per annum from the date of said orders. The orders issued to the contractors were in compliance with the contract and provided for the payment of interest at ten per cent. per annum. Payments were made, from time to time, on these warrants, until 1885, when the orders first issued were taken up, and the orders upon which this suit was brought were issued for the balance due for building the schoolhouse. The orders last issued provided for interest at the rate of six per cent. per annum. The defendants claim that the

contract to pay interest at the rate of ten per cent. on the original orders was void, so far as it related to the rate of interest, and that, in computing the amount due on the renewal orders, no more than six per cent. interest should be computed on both sets of orders from the beginning.

The question for determination is whether, under the foregoing facts, the board of directors had power to contract for interest at ten per cent. per annum. If they had not the power to bind the district by such a contract, they could not make it valid by any subsequent act, as by a renewal, and the issuance of other warrants at a legal rate of interest. The debt remains the same, and its identity is not destroyed by the renewal orders. The payments made on the first orders should be applied in discharge of that part of the debt which was legal and valid, and to the extent to which the directors had the power to bind the district. And no question is made as to the right of the district to interpose any valid defense to these orders, which could have been made against the same in the hands of the original contractors. It is provided by section 1824 of the Code that "all school orders shall draw lawful interest after having been presented to the treasurer of the district and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer." This law does not provide that the school directors may determine what rate of interest an order shall draw. It can not draw any interest until it has been presented for payment and indorsed, and after that it draws interest by operation of the statute, and not by reason of any contract. The rate of interest referred to is six per cent. per annum, as provided by section 2077 of the Code. The exception therein contained, that agreements in writing may be made for ten per cent. interest (now eight per cent.), has no application to school orders, when that section is considered in connection

with section 1824. It may be said further, in this connection, that when the directors invited contractors to make their bids, without any mention of the rate of interest to be paid on warrants, it is to be presumed that bidders knew that school orders do not draw interest until presentment for payment. But further consideration of the question is unnecessary. This court determined the precise point in the case of *Austin v. District Tp. of Colony*, 51 Iowa, 102, 49 N. W. Rep. 1051, which was an action to recover upon warrants issued by a school district for borrowed money. The warrants provided for interest at the rate of ten per cent. The following language is found in the opinion in that case: "According to the view which we have taken of this case, while the directors had power to borrow money to discharge a legitimate indebtedness previously contracted, they did not have the power to contract to pay more than six per cent. interest. The order sued upon was given some time after the money was loaned, and embraces some interest at a greater rate, as we infer, than six per cent., supposed to have previously accrued. The order is also made to bear ten per cent. interest. It appears, therefore, that it was given for too large a sum, and that part which provides for ten per cent. interest is, in part, invalid. The amount recoverable upon the order, we think, is the sum of four hundred and ninety-five dollars, the amount loaned, and six per cent. interest thereon from the date of the loan." The question in this case is precisely the same. It is true, the main question in that case related to the power of the directors to borrow money, and upon that question the court was divided; but the question of the rate of interest was directly involved, and upon that there was no dissent. We see no good reason for overruling the cited case. The judgment of the district court is AFFIRMED.

THE STATE OF IOWA v. CYRUS VERMILLION AND DAVID GREGORY, Appellants.

Criminal Law: DEFECTIVE ABSTRACT: REVIEW ON APPEAL. Exceptions to the admission of evidence which might be admissible under some circumstances, to the giving of instructions abstractly correct but claimed to be erroneous as applied to the facts at bar, and to the court's permitting the shorthand notes of the evidence to be read to the jury after retirement, will not be considered on appeal when the abstract does not contain the evidence, and fails to state when said notes were read to the jury. (2)

Appeal from Mahaska District Court.—HON. A. R. DEWEY, Judge.

MONDAY, JANUARY 29, 1894.

INDICTMENT for larceny. Verdict of guilty, and a judgment from which the defendants appeals.—*Affirmed.*

J. C. Williams and *W. S. Kenworthy* for appellants.

B. W. Preston and *Thos. A. Cheshire*, with *John Y. Stone*, Attorney General, for the state.

GRANGER, C. J.—I. The larceny charged is of a harness, from one Roberts. It seems that at about the same time there was a larceny of a harness from one Nelson, and from the argument of appellants it appears that there was testimony on the trial of this indictment as to the larceny of the Nelson harness, and appellants complain of the action of the court in that respect. The testimony is not in the abstract. It is not to be doubted but that the facts as to two separate larcenies might be so connected that, on the trial of an indictment for one, facts as to the other might be admissible.

Of course, the fact that one larceny has been committed can not be shown as tending to prove the commission of another. As the testimony might be proper and the evidence is not in the record, we can not determine the question.

II. Complaint is made of several of the instructions given. They are, as abstract propositions of law, correct. We can only determine their correctness, as applied to the facts of this case, from the evidence, which, as we have said, is not before us. A party assigning error should put in the abstract the part of the record necessary for the consideration of the assignments. *State v. Grossheim*, 79 Iowa, 75, 44 N. W. Rep. 541.

III. From the arguments, it appears that, after the jury retired for deliberation, it came into court, and asked that the shorthand reporter read to it, from his notes, the testimony of two witnesses, and that the court permitted it, against objection. Without saying that such a proceeding would be erroneous, we need only say that the abstract does not show such a state of facts. It does not show that the "shorthand reporter read only the evidence given in chief by the said witnesses W. J. Smith and Jacob Auer, and did not read the evidence given in cross-examination." The abstract does not show when this happened, and, judging from the record, it may have been before the retirement of the jury, as is often done. The difficulty is that this case is before us with a skeleton bill of exceptions embodied in the abstract, instead of an abstract made from a completed bill of exceptions. In view of the record, we can not consider the points argued. **AFFIRMED.**

W. J. DYSART, Administrator, v. JOSEPH FURROW,
Appellant.

Transaction with Decedent: LAYING FOUNDATION FOR INTRODUCTION OF BOOKS. Code 3639, providing that no party may be examined as to a personal transaction between him and a person then dead, does not prevent the examination of such party as to facts required to be shown preliminary to his introduction of a book of account to establish a claim against a decedent's estate, and, upon proper authentication, the book is admissible to establish such claim.

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103	507
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116	18

Appeal from Tama District Court.—HON. J. H. PRESTON,
Judge.

MONDAY, JANUARY 29, 1894.

PLAINTIFF, as administrator of the estate of J. W. Bowen, deceased, brings this action to recover upon three promissory notes. Defendant answered, admitting liability on the notes, and setting up as counterclaim an alleged indebtedness of the deceased to him on account for boarding, merchandise, meat, etc., furnished by defendant. Also on an account to E. E. Furrow for services as housekeeper, for nursing, etc., which was assigned to defendant for value. Plaintiff replied, denying the counterclaim, and pleading the statute of limitations as to part thereof. A jury being waived, the case was tried to the court, and judgment rendered in favor of the plaintiff for the full amount of the notes. Defendant appeals, assigning as errors certain rulings of the court excluding evidence offered by the defendant.—*Reversed.*

W. H. Stivers, J. W. Willett and N. C. Rice for appellant.

No appearance for appellee.

GIVEN, J.—The defendant was called as a witness, and testified that he was running an hotel or boarding

house and a liverybarn in 1878, 1879, and 1880, and a meat market since January, 1883; that he kept books of account, and had them in court. He testified without objection that he kept his accounts while in the hotel and livery business in one book; that it was his book of original entries; that the charges therein were made by him at or about the time of the transactions, and that the entries therein are correct. Defendant then offered page seventy-four of this account book, marked "Exhibit A" in evidence. Plaintiff objected as incompetent, immaterial, and irrelevant. "Received, subject to objection, to be determined on the argument." Defendant was then asked a number of questions with a view to the introduction of the book, to each of which plaintiff's objections were sustained. Defendant offered to prove that Exhibit A was his book of original entries; that the entries were in his own hand, and that he believed them to be just and true. Plaintiff objected to these offers as irrelevant, incompetent, and immaterial, which objections were sustained. Defendant again offered page seventy-four of said book in evidence, to which plaintiff made the same objections, and the objections were sustained. We have no argument for appellee, and no reason is given in the record in support of these rulings. The only ground that occurs to us for the rulings is that the evidence was held inadmissible under section 3639 of the Code, which, as applicable to this question, is as follows: "No party to any action or proceeding * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane or lunatic." The examination was as to matters which, under section 3658 of the Code, the defendant was required to show by his own oath or otherwise before his book of account could be admitted in evidence. The facts

which he was required to show were that said book was his book of original entries, that the charges were made at or near the time of the transactions therein entered, and that he believed them just and true. With these facts shown, defendant was entitled to introduce his book, and if it showed "a continuous dealing with persons generally, or several items of charge at different times against the other party," to have it considered as evidence, "subject to all just exceptions as to their credibility." An examination as to the facts required to be shown preliminary to the introduction of a book of account is not an examination in regard to personal transactions or communications between the witness and the deceased, within the meaning of said section 3639. To properly understand and apply that restriction to an examination of a witness, we must have in mind the reason for the statute. By section 3636, "every human being with sufficient capacity to understand the obligation of an oath is a competent witness in all cases both civil and criminal, except as herein otherwise declared." The exceptions are not as to the competency of witnesses, but the restrictions that are placed upon their examination in said section 3639 and in section 3642 as to communications between husband and wife. Under said section 3636 all persons are competent witnesses, regardless of their relation to or interest in the action or proceeding. Each party may meet his adversary from the witness stand as well as in his pleadings, and admit or deny that which he has said as to personal transactions or communications between them. If the transaction or communication was personal, it must be known alike to both, and, therefore, either may admit or deny. When by death, insanity, or lunacy the lips of one party are closed, section 3639 wisely closes the mouth of his adversary as to personal transactions and communications which the silent party

might from personal knowledge deny, were he able to speak. Personal transactions and communications, as contemplated in the statute, are transactions and communications between the parties, of which both must have had personal knowledge. This defendant was a competent witness, and entitled to testify as to all material facts except as to such personal transactions and communications between him and the deceased. For him to testify that his book Exhibit A was his book of original entries, that the charges were made at or near the time of the transactions therein entered, and that he believed them to be just and true, would not be stating anything that the deceased, if living, could deny from personal knowledge. The deceased might, if living, deny that he received any one or all of the items charged, but this would be denying that which the book tends to show, and not any of the three preliminary facts which defendant was prevented from showing. *Roche v. Ware*, 71 Cal. 375, 12 Pac. Rep. 284; *Snell v. Parsons*, 59 N. H. 521. This book of account, when properly authenticated, was admissible in evidence, even against the estate of a deceased person. The statute expressly and without qualification permits the preliminary facts to be shown by the party's oath, and in so showing them he is not examined as to personal transactions between him and the deceased. We think the book should have been admitted on the first offer on the evidence introduced without objection. If its sufficiency was doubted, then the defendant should have been permitted to make the proofs which he offered to make.

Other errors are assigned, but, as we have no argument for appellee, and as, for the reasons stated, the judgment must be reversed, we will not here consider the other assignments of error. REVERSED.

COMMERCIAL BANK OF ESSEX, Appellant, v. WM. PADDICK
AND A. E. PADDICK.

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Fraudulent Negotiable Note: Action by Assignee: SUFFICIENCY OF EVIDENCE TO SHOW BONA FIDE ASSIGNMENT. In an action by a partnership bank on a note fraudulent in its inception, taken by it as collateral, the partnership must show that all its members were, at the time of the purchase, ignorant of the fraudulent character of the note.

EVIDENCE OF BONA FIDES: INSUFFICIENCY OF. The uncontradicted testimony of one partner that he had charge of the loans, that no one but he and the assignor of the note took part in the assignment and "that no other officer or agent of the bank knew for what the note in suit was executed," leaves it a question for the jury whether plaintiff has proven itself to be the *bona fide* holder of the note; more especially as the partner testifying had knowledge of facts, which knowledge while not amounting to notice of the fraud, was a circumstance properly putting the credibility of his testimony in issue.

Appeal from Dallas District Court.—HON. J. H. APPLE-
GATE, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION upon a promissory note. Trial by jury, and verdict and judgment for the defendants. Plaintiff appeals.—*Affirmed.*

Cardell & Nichols for appellant.

Shortley & Harpel for appellees.

ROTHROCK, J.—The note upon which the suit was brought is dated February 16, 1891, and is for the sum of one hundred dollars, due in six months, with eight per cent. interest, and payable to the order of A. H. Warren. It is signed by the defendants. Warren, the payee of the note, indorsed it to the plaintiff before it became due. The defendants admitted their signatures to the note, but alleged that the same were obtained by

fraud and were wholly without consideration. It appears from the evidence that the defendants are husband and wife and that they reside in Dallas county, in this state. Warren, the payee of the note, was, at the time he obtained the same, a resident of Page county. He was a mountebank, or traveling quack doctor, of whom it has been said: "Nothing is so impossible in nature but mountebanks will undertake." The following is the testimony of the defendant William Paddick: "He examined me for piles and made a great ado, and said I was terrible bad. That two large tumors were forming inside of me, and, unless something was done immediately, I would die. I would have to have something done. That kind of roused me up. He said he thought he could do something for me, provided I had it done immediately. He showed my wife a picture he had in a book, and showed what kind of a tumor it was. Said that was the kind of a tumor that was forming in me. My wife was scared about it, and said if anything could be done, better have it done immediately. He said it would have to be done immediately, or I would lose my life. He said he could cure me provided I would have it operated on right away. He did not operate on it that day. He examined me. He did not state the date he would operate on me. He was to notify me soon. In two or three weeks he notified me to meet him in Des Moines, at the Aborn House. I was unwell, and could not get out of the house. I sent my wife. She could not find him. He did not write any word for something like a month after that, when he again told me to meet him at the Aborn House. I went down. He was not there. I saw him on the platform at the depot. I told him that I thought he knew well enough he misrepresented my case. I know he did misrepresent my case. I have had nothing done since, and there is nothing of the kind wrong with me. There were no tumors there. He did not offer to exam-

ine me. He never done anything for me except the examination. I believed his statements about the tumors, and that they would have to be removed, were true, or I would not have given the note. Gave the note solely upon these representations." There was no evidence in the case in conflict with the above, and it is scarcely necessary to say that the note was without consideration.

The plaintiff claims that it loaned to Warren the sum of three hundred and fifty dollars for ninety days, and took the note in suit, with others, as collateral security for the payment of the loan, and that it was a good faith transaction, without notice of any fraud or want of consideration in the note. There is no question made by appellant, but that the note was procured by fraud and was without consideration. The court instructed the jury as to the burden of proof as follows: "If you find that, as between the parties to said note, the same can not be enforced for want of consideration and on account of fraud, then, before the plaintiff can recover, it must show that it received said note as collateral security for the payment of money advanced at the time it so received said note; that same was received by it in the usual course of business, without notice of the defenses, if any, to said note, and before maturity of said note; and, to establish these matters, the burden is upon the plaintiff to establish them by a fair preponderance of the evidence." The rule of law embodied in this instruction is correct. *Lane v. Krekle*, 22 Iowa, 399; *Woodward v. Rodgers*, 31 Iowa, 342; *Bank v. Nelson*, 41 Iowa, 563. The plaintiff introduced J. P. Nye as a witness. He testified that he is now vice president of the bank, and when the note in suit was indorsed to the bank he had charge of the loaning of the funds of the bank; and that Warren, the payee of the note, resided at Shenandoah, Iowa, and that he had

known him for four years. That he had no knowledge of the defendants, but that Warren represented the defendants to be financially good. That no other persons took part in the transaction but Warren and himself. He further testified that no other officer or agent of the bank knew for what the note in suit was executed, and that Warren had made no payment on the note, and that the amount of the notes taken as collateral security exceeded the amount of money he loaned to Warren in the sum of five dollars, and that no part of the collaterals had been paid excepting about forty dollars, and that the plaintiff is a private bank. It is contended by counsel for appellant that the evidence that the plaintiff was a *bona fide* purchaser of the note is so conclusive that the court should have directed a verdict for the plaintiff. In our opinion, the court rightly submitted the question of the good faith of the plaintiff to the jury. It has been held by this court that in case of the purchase of a note by a partnership the burden is upon it to show that all members of the partnership were, at the time of the purchase, ignorant of the fraudulent character of the note. *Frank v. Blake*, 57 Iowa, 750, 13 N. W. Rep. 50. The court instructed the jury in accord with the rule announced in the cited case. It is not denied that the plaintiff is a partnership. The witness Nye testified that it is a private bank. It is claimed, however, that the evidence shows that no officer of the bank had notice of the fraud. It is true that Nye so testified. But it is apparent that he was testifying to a fact either from hearsay or which he did not know to be true. In either case it was for the jury to determine that question. This failure of proof is sufficient to sustain this verdict.

There are many other circumstances in the case which were properly for consideration of the jury. We will mention but one. The witness Nye testified that he had known Warren for four years, and he knew that

he was a physician. He must have known what his reputation was. If he did not, he ought to have so testified. He knew that Warren was a traveling doctor, and that this note was executed by persons who resided in a distant part of the state. In short, what he did know of the man, while not amounting to notice of the fraud, was a circumstance which the jury might very properly consider in determining the credibility of his testimony. The case demands no further consideration, and the judgment is AFFIRMED.

CITY OF KEOKUK v. FORT WAYNE ELECTRIC COMPANY,
Appellant.

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Electric Light Franchise: TO BE SUBMITTED TO VOTE. Ordinances granting a franchise to occupy streets with poles and wires for the distribution of electric light and power must be submitted to a vote of the people, under Code, 471. *Hanson v. Hunter*, 86 Iowa, 722, 53 N. W. Rep. 84, followed. KINNE, J., *dissenting*. (4)

SETTING UP INVALIDITY OF CONTRACT: ESTOPPEL. A company having forfeited a deposit made to be used as liquidated damages if it broke its contract to furnish the city with a specified number of lights, and having but partly complied with the contract, is not estopped from setting up the invalidity of the contract when sued for its breach, where the city has made no payments in excess of services actually rendered. (3)

Appeal from Lee District Court.—HON. JAMES D. SMYTHE, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION at law to recover damages of the defendant for failure to comply with an alleged contract to furnish and maintain, in the streets of the plaintiff city, one hundred and twenty-five arc electric lights. A jury was waived, and a trial was had before the court. A judgment was rendered against the defendant for three thousand, nine hundred and ninety-nine dollars and ninety-nine cents, and it appeals.—*Reversed*.

W. J. Roberts and *Charles H. Worden* for appellant.

D. F. Miller, Sr., City Attorney, and *A. J. McCrary* for appellee.

ROTHROCK, J.—I. The appellee presented a motion to strike from the files an amendment to the assignment of errors. It is unnecessary to determine the question presented by the motion, for the reason that we do not find it essential to consider the amendment of the assignment of errors. In our opinion, the rights of the parties may be determined upon the errors originally assigned, and of the sufficiency of which there is no question.

II. Another motion of appellee was submitted with the case, in which it is sought to strike out the evidence from the abstract because it was not preserved by a bill of exceptions. This motion is not well taken. An examination of the whole record shows that it is not defective in the respect claimed. We need not discuss the question.

III. A statement of facts appears to be necessary to a clear presentation of the grounds upon which we base our decision in the case. It appears that at some time prior to the year 1890 there was an electric light company in the city of Keokuk known as the Badger Electric-Light Company. Its plant was sold at sheriff's sale on the twelfth day of December, 1890. There was another Keokuk company known as the Gate City Electric-Light Company. It had leased the property of the Badger Company, and on the seventeenth day of October, 1890, a written contract was entered into between the city and the Gate City Company by which the said company bound itself to furnish to the city one hundred and twenty-five arc lights for the period of five years. Sixty of said lights were to be put in oper-

ation within forty-five days, and the remainder within ninety days, from the date of the contract. The city was bound by said contract to pay to the Gate City Company the sum of sixty dollars a year for each of the said lights so erected and maintained. When this contract was made, the Gate City Company had on deposit with the city the sum of five hundred dollars, which was held by the city as security for the performance of the contract by the said company; and it was part of the contract that the deposit should be forfeited to the city if the contractor should fail to furnish the lights at the time contracted for, and that said sum should be regarded by the parties as liquidated damages. The Gate City Company did not furnish all of the lights by the stipulated time, and on the nineteenth of February, 1891, the city council adopted a resolution which was in these words: "By Alderman Buck: Resolved, that there be, and there is hereby, granted to the Gate City Electric Company sixty (60) days' additional time from February 20, 1891, in which to put in operation the additional sixty lights of the one hundred and twenty-five arc lights provided for by its contract with the city of Keokuk: provided, however, that the Gate City Electric Company shall waive any claim to the five hundred dollars deposited by it with the clerk of the council at the time of depositing its bid with the clerk of the council, and agree that it may be retained by the city of Keokuk as liquidated damages, as provided by its contract with the city, for failure to put in the one hundred and twenty-five arc lights as provided by said contract; and provided, further, that if said additional lights are not erected and in operation within the said sixty days, that it will work a forfeiture of the rights of said company under its contract with the city; and the city attorney is hereby instructed to serve notice as provided by the contract." It appears that the Fort Wayne Electric Company, appellant herein, is

a foreign corporation located at Fort Wayne, in the state of Indiana, and the said company or its officers were interested in the said Keokuk companies as stockholders. On the seventeenth day of January, 1891, a memorandum of a contract was made between the Fort Wayne Company by R. T. McDonald, its treasurer, and the stockholders in the said other companies, by which the Fort Wayne Company took an assignment of the sheriff's certificate of sale of the Badger Electric-Light Company, and of its lease to the Gate City Company, and of the stock held by the Keokuk stockholders in the last named company. The time for completing the erection of the lights, as extended by the resolution above set out, expired on the twentieth day of April, 1891. This suit was brought on the twenty-fifth day of March, 1891. On the third day of April of that year, the city made a contract with one J. C. Hubinger to furnish one hundred and twenty-five arc lights, and agreed to pay therefor the sum of sixty-eight dollars a year for each of said lights. One ground upon which recovery was sought was that the Fort Wayne Company, as the assignee of the Gate City Company, made a verbal contract with the city to perform the contract made by the city with the Gate City Company. A large mass of oral evidence was introduced on the trial in the court below, the object of which was to prove the alleged verbal contract. We need not discuss the questions raised upon that issue, for we believe that the case must be determined upon other grounds, which we will proceed now to consider.

IV. It is a conceded fact that no vote of the people of the city of Keokuk was at any time taken upon the question of the establishment of an electric light plant by the Gate City Company nor by the Badger Company. It was held by this court, in the case of *Hanson v. Hunter*, 86 Iowa, 722, 48 N. W. Rep. 1005, that an ordinance of a city granting a franchise to erect an

electric light plant in the city, and to occupy streets with poles and wires, was void, because it was not authorized by a vote of the people. A petition for rehearing was allowed in that case, and after most able and exhaustive arguments of counsel, and a full reconsideration of the question, the petition for rehearing was overruled, and the original opinion adhered to. 53 N. W. Rep. 84. Counsel for appellant contends that the decision in *Hanson's case* should be overruled. We discover no grounds upon which such a proposition ought to be entertained. It is claimed, however, with great confidence, that the cited case is not applicable to the facts in the case at bar. The proposition of counsel is that the contract in the case at bar is an executed contract, and that it would be unjust to allow the defendant to retain the fruits of the contract, and at the same time to claim that the contract is void. But the plaintiff made no payment for the electric lights in excess of the service rendered; it incurred no liability in advance for the lights which were furnished. The ground upon which it claims damages is that it has paid and will be compelled to pay eight dollars per light per annum more than it would have been required to pay defendant if it had erected and maintained one hundred and twenty-five lights for five years; and the court adopted that basis in ascertaining the measure of damages. It will be seen that it is a mistake to designate the contract as executed. An executed contract is "one which has been fulfilled,—one which has been wholly performed; as, when A. and B. agree to exchange horses, and do so immediately" (2 Bl. Comm. 443); "one in which both parties have done all they are required to do" (1 Bouv. Law Dict. [15 Ed.], page 622). This is the strict technical definition of an executed contract. An executory contract is "one in which some future act is to be done; as, where an agreement is made to build a house in six months, or to do any act

at a future day." *Id.* It is perhaps not an important question as to what the contract in this case may be named. Counsel for appellee, in support of the claim that the defendant can not avail itself of the invalidity of the contract, cites, Angell & Ames on Corporations, 240, and calls special attention to the following language: "The courts of New York have gone very far in enforcing contracts made by corporations, although they are not justified by their charters; and the law in that state now appears to be that such a contract, which is purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, should not be enforced, but that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require." The following extract from Sedgwick on Statutory and Constitutional Law, 73, is also set out in argument: "It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exceptions that although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement can not be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains. And the principle of this exception has been extended to other cases. So, a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description." It appears to us to be

quite clear that the facts in this case do not bring it within the rule announced in these extracts from the learned authors. It is true, there are a large number of cases to be found supporting the rule. It is founded on the plainest principles of justice. No court has ever decided that a corporation may borrow money, and keep it because it was forbidden by its charter to borrow money. If the plaintiff in this case had paid the defendant in advance for the electric light service, and had brought an action for damages, the case would be within the rule laid down in the text-books above cited. No one would contend that the defendant could avail itself of the invalidity of the contract to enable it to retain that which it never earned, and thus violate the plainest rules of good faith. The evidence in this case tends to show that it was worth more than sixty dollars per annum to maintain arc lights in the city of Keokuk. The defendant declined to continue furnishing lights at that sum. The city made a contract with Hubinger for one hundred and twenty-five lights at sixty-eight dollars a year, and the case was tried upon the theory that they were worth that sum. The plaintiff has the five hundred dollar deposit, and has not paid anything in excess of sixty dollars for each light furnished. It made its contract with Hubinger, and brought this suit before the time expired in which defendant was to furnish the additional lights. We think it is in no position to demand any further damages than those already received. The demand that the defendant should have continued to furnish lights at a loss for five years, and be liable at any time to have its compensation for the lights cut off at the suit of any taxpayer, as was done in *Hanson v. Hunter, supra*, is not warranted by any equitable consideration which we are able to discover. The cases cited by counsel are, as we have said, founded on entirely different facts, and involve a principle in no

wise applicable to the facts of this case. The judgment of the district court is REVERSED.

KINNE, J.—I dissent from the conclusion reached by the majority of the court, nor can I agree to the doctrine announced in *Hanson v. Hunter*, 48 N. W. Rep. (Iowa) 1005, and 53 N. W. Rep. 84. The judgment below should be AFFIRMED.

FRANK P. BOYER, Appellant, v. E. B. KINNICK.

Constitutional Law: Imprisonment for Debt: COSTS IN CRIMINAL CASES. A statute authorizing imprisonment of one convicted in a criminal prosecution for nonpayment of costs, does not conflict with constitution, article 1, section 19, prohibiting imprisonment for debt "in a civil action" unless for fraud. If such costs be a debt at all, it is adjudged in a criminal and not a civil action.

Appeal from Davis District Court.—HON. H. C. TRAVERSE, Judge.

TUESDAY, JANUARY 30, 1894.

HABEAS CORPUS. The defendant is sheriff of Davis county. The plaintiff was, on his plea of guilty, convicted of violating the law against the sale of intoxicating liquor. A fine was imposed, and a judgment rendered against him for costs, with an order for imprisonment till both were paid. He paid the fine, and he stands imprisoned for nonpayment of the costs, and this proceeding is to test the validity of the imprisonment. The court below held the imprisonment legal, and remanded the prisoner.—*Affirmed.*

S. S. Carruthers and Eichelberger & Taylor, for appellant.

GRANGER, C. J.—The imprisonment is authorized by the statute, and the only question in the case is the

constitutionality of the law. The provision of the constitution relied upon as contravening the legislative act is section 19 of article 1, as follows: "No person shall be imprisoned for debt in a civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace." The legislature may exercise legislative authority, wherein it is not prohibited by the constitution. *Stewart v. Board*, 30 Iowa, 9. The claim of appellant is that the judgment for costs is a debt, and, therefore, the legislature can not authorize an imprisonment for it. But if it is a debt, the act authorizing imprisonment for it is not contrary to the section of the constitution quoted, for the costs were adjudged in a criminal, and not a civil, action, and the section applies only to the latter. The language is, "No person shall be imprisoned for debt in a civil action." But, further, it may be said, on good authority, that a judgment for costs in a civil action is not, within the constitutional meaning, a debt. In Alabama the corresponding provision of the constitution is broader than ours, seemingly applying to a debt in any form, the language being that "no person shall be imprisoned for debt." The supreme court of that state, in giving the provision application, said: "In criminal cases the cost is no more a debt than the fine, and, accurately speaking, not so much so, for the fine is a sum certain *in numero*, and the cost is not." *Morgan v. State*, 47 Ala. 34. In Indiana the constitutional provision is, "There shall be no imprisonment for debt, except in case of fraud." The supreme court of that state said in *McCool v. State*, 23 Ind. 127: "The costs are but an incident of the fine assessed, resulting from the same act; and although they are due to the officers of the court and witnesses, for services rendered in the course of the prosecution, they are adjudged against the defendant because of his criminal act, and may be

fairly regarded as a part of the punishment. The fine, when assessed, becomes a fixed liability to pay the state a definite amount of money. The costs are taxed, and are due to the officers and witnesses, and we are at a loss to perceive upon what principle the latter is a debt, within the meaning of the section of the constitution referred to, while the former is not."

A prominent feature of appellant's argument is based on the fact that the costs are due to individuals, and only incident to the fine. Authorities to the same effect are cited. It will be seen that such fact does not make the costs a debt, so as to bring them within the constitutional provision as to imprisonment. The order of the district court is **AFFIRMED**.

CHARLES REIFSNYDER, Appellee, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Accident in Railroad Yard: CONTRIBUTORY NEGLIGENCE, WHAT IS NOT. A driver, with the knowledge of defendant's employees, loaded a car belonging to the Chicago, Burlington & Quincy Railway Company. There was a narrow space between the car and defendant's switch track not wide enough for a team to be turned around in, which passage was generally used by persons having business with defendant. The loading was done on that side of the car next to the narrow passage mentioned. It could have been done on the other side of the car, where there was an open space about forty feet wide, but that space was muddy. There was no positive evidence that the driver had seen switching being done on defendant's tracks, that day, or that he could have seen it from where he worked. There was nothing to show that he had any reason to think that his team would frighten. He was driving along said narrow passageway to the street when a car, moving along defendant's track, frightened his team, and the track on the opposite side of the way being filled with cars, it turned across defendant's track in front of the car, and was killed. *Held*, that a finding that the driver was free from contributory negligence, will not be disturbed. (1)

SUFFICIENT PROOF OF NEGLIGENCE. A finding that it is negligence not to place a brakeman on cars making a flying switch in a private yard frequently used, with defendant's consent, by persons having business with it, will not be disturbed. (3)

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EXPERT TESTIMONY. Expert testimony may show that the proper position of a brakeman on a car making a flying switch is at the brakes. (4)

Appeal from Wapello District Court.—HON. H. C. TRAVERSE, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION to recover for damages to a team, wagon, and harness. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

McElroy & Roberts for appellant.

W. H. C. Jaques for appellee.

KINNE, J.—I. The testimony shows that the ground where the accident happened is bounded on the east by Jefferson street, on the south by the Des Moines river, and on the west by Greene street. A plat attached to the abstract shows that Greene street is on the east, and Jefferson street on the west; but this is a mistake, as appears from the testimony of all of the witnesses. The action is brought to recover damages to the team, wagon, and harness of plaintiff. The following facts are either admitted in the pleadings or established by the evidence: The accident occurred on the switch and depot grounds of defendant, in the city of Ottumwa, and on defendant's track. These grounds lie between the depot grounds of the Chicago, Burlington & Quincy Railway Company and the Des Moines river, and access is had to them by passing down either Greene or Jefferson street. These streets run parallel with each other, and are about four hundred feet apart, and cross the grounds of both railway companies at right angles. At the time of the accident, plaintiff's team was in charge of a young man nineteen years old. This man and plaintiff's son had during the day been hauling bones in a wagon, and loading them into a car belonging to

the Chicago, Burlington & Quincy Railway Company, standing upon its transfer track, at a point from forty to one hundred and ninety-eight feet west of Jefferson street. The men had been loading from the south side of the car, next to the depot and switch grounds of the defendant. The space where the unloading was going on was not wide enough to permit the team to turn around. There was a clear space about forty feet wide on the north side of the car, which extended from Greene to Jefferson street. The car could have been loaded from that side, but it seems that the ground there was muddy, and filled in with fresh earth. The evidence is not clear as to the direction the man had come from into this narrow space with prior loads,—whether from Greene or Jefferson street. Defendant's switches were east and west of the place where the bones were being loaded into the car. It appears, also, that defendant did all of its own switching for its city business, and also switching for the Wabash Railway Company, on these grounds. Before the man drove his team away from the car where he was loading bones, defendant's employee's had been engaged in switching cars; and, as near as can be gathered from the evidence, this switching had been going on west of Greene street. After the man had unloaded the bones, he started his team west, along the south side of the transfer track, through a passageway too narrow to turn around in, yet wide enough to drive through to Greene street. This passageway was frequently used by 'buses and drays to reach Greene street. As the man was driving along this narrow way, he met a car coming down the main track of defendant; and when it came within ten or twenty feet of his team the horses took fright, and as the transfer track on the north side was filled with cars, so that they could not go across it, they turned south, across defendant's track, and in front of the moving car, and were caught and killed. There is no positive

evidence that the man in charge of this team had seen any switching going on there the day of the accident. Indeed, it appears that the switching was done only from 3:15 to 4:30 o'clock p. m. It also appears to be doubtful if the man in charge of the team could have seen much of the switching, as nearly all of it was done west of Greene street. The car that killed the horses had been kicked back toward the team. As to whether or not an employee of defendant was on the car and applied the brake before the horses were struck, is a matter upon which the testimony is conflicting.

II. It is said that plaintiff's driver was guilty of negligence which should defeat a recovery. The jury specially found that the driver did not know, and by the exercise of ordinary care could not have known, that switching was being done in defendant's yards, where the accident occurred, at the time of the accident; that the place was not a dangerous place in which to drive teams; and that the driver did not know, and could not have known by the exercise of ordinary care, that it was dangerous to attempt to drive where he did; and that he was not negligent in so doing. It is said that the evidence does not sustain these findings. There is no direct evidence that the driver knew that any switching was being carried on at that time in these yards. As a matter of fact, switching was being done there, but it appears that most of it was west of Greene street, where he could not see it. But, even if he did see it, it does not follow that he had no right in there. He was loading a car, and using the passage, as he had a right to do. The use of this passageway is shown to have been quite general by persons having business with these railroad companies. He was not a trespasser upon the railroad grounds, but there with the knowledge of the defendant's servants, and, it may be said, with their consent, inasmuch as no protest was made against his being there. The mere fact of his being

there would not show negligence. The question of plaintiff's driver's negligence in going into this passageway was properly submitted to the jury, and they found against the defendant. It may be that, sitting as jurors, we should not have found as the jury did, as to all these matters; but the evidence was sufficient to sustain the findings, and we must, therefore, say that plaintiff or his driver was not negligent. From its frequent use, the passageway appears to have been safe enough, under ordinary circumstances, if a team did not frighten. There is nothing to show that the driver had any reason to think that the team would frighten.

III. It is contended that the defendant was not negligent; that it owed no duty to plaintiff to keep a man on a car which was being kicked back over its tracks in its own private yards. Plaintiff's contention is that it appears from the evidence that no brakeman or switchman had set the brake before the car struck the horses; that, had there been a brakeman at the brake on the car when it was kicked back towards his team, he could and would have stopped the car, and prevented the accident. A ground of negligence, in the petition, is that this car was kicked back without any one in charge or control of it. This is put in issue by the defendant's answer. We are not prepared to hold that a railway company may switch cars, even at the rate of four miles an hour, in its private yards, where its employees know, or have reason to expect, that the drivers of teams may be lawfully between the tracks, without having an employee ride such cars. Whether they owed a duty to plaintiff to have a man on top of this car which had been kicked back would depend upon circumstances surrounding the accident. They knew that this man was in there with this team. At least, several of the defendant's employees knew it. They knew that this passageway was used frequently by persons driving teams, and having business with

these companies. Knowing of the frequent use of this passageway, the defendant's employees might naturally anticipate that someone would be in there, and in this case they actually knew that plaintiff's team and wagon were in the passageway. Knowing such facts, and after consenting to such a user of the passageway by the public, it was a proper question to submit to the jury as to whether, in view all the facts and circumstances surrounding the accident, defendants were negligent, in not having a brakeman ride the kicked car. The jury found, and properly so, that the defendant was negligent, and we are not warranted in disturbing their finding. While there is, as we have said, some conflict in the evidence, still the jury were warranted in finding that the car was not ridden by a brakeman; that he did not get on top of it in time to apply the brake before the car struck the horses. Other evidence was introduced, which was not contradicted, showing that, if a brakeman had rode the kicked car, he could have stopped it within a distance of from fifteen to sixty feet from the point where the brake was applied.

IV. Plaintiff asked witness Crowley, an experienced brakeman, this question: "Suppose a car is kicked down the track from about Greene street toward Jefferson. There is no circumstance to call the brakeman's attention to any particular effort on his part. That he is riding a car down there. Ordinarily, where would be his position on the car?" To which the witness answered: "The proper place for a brakeman is to be right at the brake. That is what he goes on the car for; to look ahead, and be a-hold of the brake, and be ready." Allen, an expert brakeman, was asked this question: "Suppose a brakeman is riding a car down there. There is nothing extra to call his attention elsewhere. He is on the car for the purpose of riding it down. The brake is on the front end of the car. At what place had the man ought to be, for the

performance of his duty?" He answered: "Well, his place would be at the brake." These questions were objected to as calling for incompetent evidence. The objection was overruled, and appellant assigns this ruling as error. These questions inquired for the proper position of a brakeman when riding a car. Counsel for appellant cite several cases differing in facts from that at bar. where it was held that expert evidence was not admissible. Would it not be permissible, in a proper case, to show that the post of an engineer was on the right-hand side, in the cab of the engine, and that of the fireman on the left-hand side? Would it be error to permit a witness to testify as to the proper place of a front or rear brakeman on a train? If not, how can it be said to be error to permit a witness to testify that a brakeman's position, when riding a car, is at the brake? We see no objection to the questions. As a general rule, it is allowable to show the proper location of a trainman on a moving train or car. In *Railroad Co. v. Smith*, 22 Ohio St. 246, it is said: "What is a proper and what an improper place for the brakeman on the train, may be shown by a witness skilled in the business." No question is made as to the competency of these witnesses by reason of their skill and experience to testify as to the matter inquired about. The evidence sufficiently sustains the verdict, and the judgment below must be AFFIRMED.

JOHN G. ROREBECK, Appellee, v. JAMES VAN EATON.

Principal and Agent: FRAUD ON PRINCIPAL. Where an agent buys property for his principal, represents to him that he paid one thousand, five hundred dollars for it when, in fact, he paid but one thousand, one hundred dollars, and invests the four hundred dollars, or part of it, in certain lots, the principal is entitled to judgment for four hundred dollars and to have the judgment made a lien upon said lots.

Appeal from Fremont District Court.—HON. WALTER I. SMITH, Judge.

TUESDAY, JANUARY 30, 1894.

Affirmed.

W. E. Mitchell for appellant.

Anderson & Anderson for appellee.

KINNE, J.—The only question in this case is one of fact,—as to whether or not defendant was the agent of the plaintiff in the transactions hereinafter set forth. It is conceded by counsel that, if the defendant was acting as agent, the judgment below was right. It seems that in February, 1891, plaintiff employed the defendant to negotiate for him with the owners for the purchase of a tract of land lying in the city of Hamburg, Iowa. The defendant represented to plaintiff that he had written the owners of the land, and that one thousand, five hundred dollars was the least they would take for the land. Relying upon these representations, plaintiff gave the defendant one hundred dollars with which to make part payment and to bind the bargain, and ordered him to make the purchase. Afterward the defendant reported to plaintiff that he had bought the land for him for the one thousand, five hundred dollars, and that by mistake the land had been deeded to defendant. The plaintiff paid one thousand dollars cash on the land, and executed his note four hundred dollars to the defendant, and secured it on the land, defendant representing that he would take the four hundred dollar note and mortgage, and advance the money himself to the owners of the land. The defendant deeded the land to the plaintiff. It appears that the defendant's representations were false; that the owners of the land only asked one thousand

one hundred dollars for it; that the defendant in fact, while all the time representing to the plaintiff that he was acting for him, bought the land in his own name. Defendant sold the four hundred dollar note and mortgage, and invested the proceeds in other real estate. While the defendant denies all fraud and false representations, and claims that he was acting only for himself, we think the evidence very clearly shows that he undertook to act as plaintiff's agent, and so led plaintiff to believe. There is no question but that the relation of principal and agent existed between the parties. Such being the fact, it needs no citation of authorities to show that the defendant practiced a fraud upon the plaintiff, whereby he was induced to pay four hundred dollars more for the land than was asked for it by the owners. The defendant knowing that the plaintiff was relying upon him to purchase the land for him as his agent, proceeded to buy it himself for the one thousand, one hundred dollars, and sell it to plaintiff for one thousand, five hundred dollars. The plaintiff had a right to rely upon his agent's representations, and did not know of their falsity until long after the transaction had been completed. This action is to recover the four hundred dollars, being the amount paid by plaintiff in excess of the sum asked by the owners of the land. The court below found for plaintiff, and made the judgment a lien upon certain lots purchased by defendant. The decree was right. It is true, the evidence might be stronger as to the investment of the money which defendant received for the four hundred dollar note and mortgage, but it sufficiently appears that a part of it, at least, was used in the purchase of the lots upon which the judgment of this case was made a lien. The judgment below is **AFFIRMED**.

ED. F. NICHOLAUS v. THE CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY, Appellant.

90	85
94	387
90	85
107	602
90	85
120	417
90	85
124	39
90	85
129	5

Master and Servant: ASSUMPTION OF RISK. While defendant's fireman was acting as engineer, his negligence caused plaintiff, a brakeman, to be injured. *Held*, that the mere fact that plaintiff knew the fireman was so acting, and his failing to object does not preclude his recovering, as having assumed the risk, nothing appearing to show that plaintiff had reason to believe the fireman incompetent. (1)

PLEADING. Assumption of risk by plaintiff is an affirmative defense, and must be pleaded. (1)

ABSENCE OF PART OF CREW: NEGLIGENCE. Whether the absence of the conductor and the engineer, leaving but three of the crew, was or was not the cause of the improper movement of the train which led to plaintiff's injury, is for the jury. (2)

VERDICT: SUFFICIENT EVIDENCE. It appears that plaintiff, making a coupling, had signalled the acting engineer to stop, that the train had nearly stopped, that the plaintiff, while trying to change the link, had his hand caught between the bumpers by reason of the train's suddenly backing without notice. *Held*, that a verdict for plaintiff will stand. (2, 3)

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION for personal injuries. Judgment for the plaintiff, and the defendant appeals.—*Affirmed*.

J. Karkskadden for appellant.

Jayne & Hoffman for appellee.

GRANGER, C. J.—In November, 1888, the plaintiff was in the employ of the defendant, as a brakeman, and was running between Muscatine and Munn. He had been on this line about six months. In going out from Muscatine, after passing Wilton, there was a station called the "U. S. Limekilns," and Munn was still

further out. It was the custom, at the limekilns, to leave on the switch the passenger coach and baggage car, and the rest of the train would run to Munn, and returning it would attach the cars left when going out, and proceed toward Muscatine. It frequently occurred that the engineer would stop at Wilton, and from there, out and back, the engine would be in charge of the fireman; and it was quite usually the case that the conductor would remain at the limekilns with the coach, engaged in making his daily reports. On the seventh of that month the train consisted of an engine, several freight cars and the passenger coach. The engineer stopped off at Wilton, and the conductor remained, as usual with the coach at the limekilns. This left with the train the fireman, in charge of the engine, and the two brakemen, of whom the plaintiff was the front one. The train returned from Munn to the limekilns, and the plaintiff left the engine where he had been with the firemen, turned the switch, and let the train back to be coupled to the cars that had been left. In making this coupling, plaintiff's hand was injured, for which recovery is now sought. The petition charges negligence in several particulars; as, "absence of the engineer from his post of duty on the engine; carelessness of the fireman in charge of the engine, and his failure to perceive the signals given him by the plaintiff, and his failure to give signals to the plaintiff, and running the cars together without warning, and in suddenly starting the train, and bringing the cars together, after they had almost come to a stop, and absence of the conductor, and his failure to see and superintend the switching of the train." The coupling was made at a curve in the track, and, because of better ground to walk on, the plaintiff was on the left hand side of the train, walking with his hand on the ladder, when he gave the signal to stop as the moving part of the train approached the cars to be coupled on. He says it nearly stopped, and,

as he was "changing the link, it came back with a sudden start," and his hand was caught between the bumpers and injured. It appears that the train was backing up cautiously to where it stopped, or nearly so, and the wrongful or negligent act was in starting it again without a signal from the plaintiff, and that none had been given. As we gather from the record, the movements of the train at the particular time were upon signals from the plaintiff as he was about to make the coupling. He had signalled it to stop as being at the point of coupling. It having stopped, or nearly so, he attempted to change the link from one drawbar to the other, in order to properly make the coupling, and he had a right to suppose there would be no further movement of the train until he should direct it. The link being fast in the drawbar from which it was to be taken, it required some effort to remove it, and, in doing this his hand came between the bumpers and a sudden unexpected movement of the train caught it. The negligent act seems to have been attributed directly to the person acting as engineer, and a particular act of negligence charged against the defendant is that of the fireman as engineer. The court gave the following instruction: "9. If you find that the engineer left the management of the engine to his fireman on the trip during which the accident occurred, and this was with the knowledge of the plaintiff and without objection from him, this is a circumstance from which the consent of the plaintiff to such substitution may be inferred; but if the plaintiff himself was free from negligence that directly contributed to his injuries, and such injuries were the direct result of the carelessness and negligence of the fireman in charge of the engine, and you so find, he would be entitled to your verdict."

I. Complaint is made of the part of the instruction relative to the substitution, in that it merely holds that the exchange of the fireman for the engineer, if

with the knowledge of, and without objection from, plaintiff, would be a circumstance from which his consent might be inferred; appellant's claim being that, under such circumstances, his consent should be inferred. Otherwise than as the exchange might naturally be expected to affect his safety as an employee, the plaintiff had no concern with it. The rule contended for could have application only in a case where there was reason to believe the exchange would involve new perils to the employee. It was the right of the company to put any competent man in charge of the engine, and negligence could not be imputed to such an act. Hence, when a company places a man in charge of an engine, it is not for an employee to question his competency; but, on the contrary, he may, from the fact that he is placed there, assume that he is competent. It does not appear that the plaintiff had reason to believe that the fireman was not competent for the service allotted to him as engineer on the part of the line where he so acted. It is not to be said that because he knew of his acting in that capacity, and did not object, he consented thereto in a way that he assumed additional hazards on account of it. The instruction is not open to the complaint made against it, nor can the rule urged by appellant be sustained.

A further complaint of the instruction is that it fails to advise the jury of "any legal effect to be given to such consent of the plaintiff;" and it is said that no other instruction tells the jury "what effect upon the rights of the plaintiff, or liabilities on the part of the defendant, is to be produced by, or is to flow from, such consent." It is true that the court does not, in its instructions, give any legal effect to the fact of consent, if it should be found, and the language, as it is, serves no beneficial purpose. We can not, however, see that it could prejudice the defendant, for the effect claimed by it could not have been given, and was, in fact,

denied by the refusal of instructions in which was asked a rule that, if the plaintiff knew of the fireman acting as engineer and did not object, "protest, or complain, that he might be considered as having waived and acquiesced in * * * the running of the locomotive by the fireman," and that he was "estopped from recovery" because of injuries resulting, etc.; and appellant complains that the instructions were not given. It will be seen that the instructions asked that a rule of estoppel be applied to the plaintiff because of his acts, or failure to act or speak when he should have done so. Without agreeing to the rule as asked, the holding of the court must be sustained on the ground that no such an issue was in the case. If defendant relied upon plaintiff's conduct as an estoppel from recovery, it was an affirmative defense, to be pleaded and proven as it is in all civil proceedings at law. *Independent Dist. of Burlington v. Merchants' Nat. Bank*, 68 Iowa, 343, 27 N. W. Rep. 255.

II. It appears that during the coupling of the cars, when the injury occurred, the conductor was in the coach, and had no part in completing the train at that point; and defendant asked the court to say to the jury as follows: "The fact that the conductor of the train did not personally superintend the coupling of the cars together can not be charged against the defendant as negligent conduct." The court refused the instruction. We do not think that there was error in the refusal. The regular train crew consisted of the conductor, engineer, fireman, and two brakemen. When the injury occurred, but three of the five were on duty, and the duties of the absent ones devolved on the others. It was surely proper for the jury to consider whether or not this shortage in the train crew was the cause of the improper management or movement of the train resulting in the injury.

III. It is urged quite strenuously that the verdict has not support in the evidence; but we think it has full support. It appears that the plaintiff was directly in the line of his duty when injured, doing the particular thing necessary to be done to make the coupling, and relying on the fact that, until he should give directions, the train would remain where it had been stopped by his directions. He was engaged in changing the pin, in doing which his hand came between the bumpers, when the negligent act of the fireman in starting the train back without notice caught and injured it. The judgment is **AFFIRMED**.

THE INTERNATIONAL TRUST COMPANY, Plaintiff, Appellants, v. THE KEOKUK ELECTRIC STREET RAILWAY COMPANY *et al.*, Defendants.

SUPERIOR COURT: JURISDICTION. McClain's Code, section 782, does not deprive the superior court of jurisdiction to direct a sale of property under a foreclosure granted by it, but the process for the sale must issue out of the district court, on a transcript filed therein. (2)

CONSENT TO SALE WITHOUT SUCH PROCESS: WAIVER. When land is sold by consent of all parties, under an order of the superior court, the parties consenting can not question the sale because not made under process of the district court. (3)

SETTING ASIDE SALE: INSUFFICIENT CAUSE. The fact that one consenting party did not bid at the sale by reason of an erroneous belief that the sale was invalid, because made under the order of the superior court, will not set the sale aside. (3)

Appeal from Keokuk Superior Court.—HON. HENRY BANK, Judge.

TUESDAY, JANUARY 30, 1894.

THIS appeal is by intervenors James H. Anderson and the Lewis & Fowler Manufacturing Company, from an order approving a sale of the defendant's property. The proceedings appear in the opinion.—*Affirmed*.

Jas. H. Anderson and *Jno. W. Cahill* for appellants.

W. J. Roberts for appellants Townsend & Son.

James C. Davis for appellee.

GIVEN, J.—I. The principal question presented on this appeal is as to the jurisdiction of the superior court. The following is a sufficient statement of the proceedings for the purposes of that question: On December 5, 1891, the plaintiff, as trustee, commenced this action to foreclose a mortgage executed to it as trustee by the defendant on all its property as an entirety, including certain real estate in the city of Keokuk, to secure to the holders thereof two hundred bonds of five hundred dollars each. December 24, 1891, appellant Anderson intervened, claiming to hold and own twenty-six of said bonds, namely, numbers 34 to 60, inclusive, and joining with the plaintiff in the prayer for judgment. Eleven other bondholders and creditors also intervened, and on February 19, 1892, all parties to the action appearing, an entry was made of record, in substance as follows: The court found that the mortgaged property "is at present in such a condition that its proper preservation requires large amounts to be expended in the betterment and improvement of said property; that said property in its present condition is of a perishable nature, and the interest of all parties concerned in same requires a speedy sale of said property to be made." The entry continues: "It is therefore ordered, considered and adjudged by the court, all parties to this controversy expressly agreeing hereto, and further agreeing that this court has complete jurisdiction, that the sale hereinafter provided shall be without right of redemption, and shall convey all of the interests of all of the parties, both complainants, defendants, and intervenors, to this controversy, in fee

simple to the purchaser at such sale." Following this, John Kenney is appointed commissioner, to advertise, sell and convey the mortgaged property "as a whole," in the manner and upon the terms and conditions prescribed. It was provided that appraisers be appointed, and the property appraised, and that it should not be sold for less than two thirds of the appraisement without the further order of the court. It was also provided that if the purchaser was one claiming to own bonds he should give security for the payment of the amount coming on such bonds from the sale in the event he was found not to be the owner thereof. Appraisers were appointed, and the property appraised as an entirety at thirty-one thousand dollars. The case was continued for further hearing as to priorities and the disposition of unpaid subscriptions to the capital stock of defendant company. On March 7, 1892, the Lewis & Fowler Manufacturing Company intervened, claiming to own bond number 31, and asking that it be allowed. On April 9, 1892, judgment was rendered on the bonds numbers 34 to 60, inclusive, held by appellant Anderson, and number 31, held by the Lewis & Fowler Manufacturing Company, against defendant, and that they share *pro rata* with all valid bonds secured by the mortgage. S. P. Townsend & Son intervened, claiming to hold and own one hundred and twenty-four of said bonds, the numbers of which are given, and asked to share in the distribution. They also asked that the sale be postponed thirty days, to enable them to negotiate with the holders of the other bonds for the purchase thereof, or the formation of a new organization for the purchase and operation of the defendant's railway. The sale was postponed until April 21, 1892. On April 19 appellants answered the petition of S. P. Townsend & Son, joining issue as to their ownership of said one hundred and twenty-four bonds. April 23, 1892, Mr. Kenney, commissioner, reported that in accordance

with the decree, and in pursuance of notice duly given, he offered the property and franchises of defendant for sale on April 21, 1892, and sold the same to S. P. Townsend & Son for twenty-one thousand dollars, that being the highest and best bid, and more than two thirds of the appraised value; and that Townsend & Son had deposited with him five thousand dollars, as required by the decree. With his report the commissioner presented a deed for approval, and asked an order as to the terms upon which it should be delivered. On the same day the affidavit of appellant Anderson was filed in opposition to the confirmation of said report and sale.

The substance of the affidavit is that on the twentieth of April, 1892, affiant said to S. P. Townsend that he was willing to sell his interest at a fair price, or to go in with other bondholders and purchase the property, and pay his proportionate share to fix the road up. That Townsend said he would rather sell at thirty-five cents on the dollar, but did not care to make arrangements with other bondholders to bid in the property. That one Wernse, who held two thousand dollars of bonds authorized affiant to bid in the road for himself and such persons as might want to go in at twenty-five thousand dollars. That affiant telegraphed one Suber to come and attend the sale, and that Suber had ready money, which he could use to buy in the property. That they attended the sale, and that when Mr. Kenney offered the property "notice was given by B. A. Dolan, in the hearing of every one, that the superior court had no power to issue any executions for the sale of real estate, and that it was his purpose to at once levy on the power house and real estate" for a judgment he had, "and that Suber then declined to bid, and that affiant was not prepared to do so without his assistance." It was admitted that, a few days after the postponement of the sale, the attorney for Townsend & Son

offered, for them, to pay Anderson thirty-two cents on the dollar for his bonds. Also that the attorney of Townsend & Son made another offer of thirty-two cents to Anderson, which he declined, and that an offer submitted by him was never replied to. On the same day—April 23, 1892—the court approved the sale and deed, and made specific orders as to the payment of the purchase money, the securing of the amount retained on account of the bonds claimed by the purchasers, and ordered the delivery of the deed on compliance with said orders; “to all of which order the said James H. Anderson and Lewis & Fowler Manufacturing Company at the time excepted.” A further decree was entered August 6, 1892, determining the rights of the different bondholders, and ordering a distribution of the proceeds arising from the sale.

II. In considering the question of jurisdiction we will refer to the act providing for superior courts as found in McClain's Annotated Code. Section 769 confers jurisdiction on superior courts “in all civil matters concurrent with the district court as now and as may hereafter be provided by law, except in probate matters and actions for divorce, alimony and separate maintenance.” Section 772 is as follows: “The superior court shall be a court of record, and all statutes in force respecting venue and commencement of actions, the jurisdiction, process, and practice of the district court, the pleadings and mode of trial of action at law or in equity, and the enforcement of its judgments by execution or otherwise, and the allowance and taxing of costs, and the making of rules for practice or otherwise, shall be deemed applicable to the superior court, except wherein the same may be inconsistent with the provisions of this act. The records and papers properly filed in a cause in the district court are equally evidence in said superior court.” If nothing further appeared, the jurisdiction of superior

courts to enter and enforce judgments in civil matters, both law and equity, except as named, would not be questioned. Appellants do not claim that the superior court did not have jurisdiction over the persons and subject-matter of this action. Its jurisdiction to try the case, as between all parties, and to enter judgments, and to decree a foreclosure of the mortgage, is not questioned, but the contention is that it did not have jurisdiction to order or approve the sale of the mortgaged property. Section 782 is as follows: "Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the circuit court, as provided in sections three thousand, five hundred and sixty-seven and three thousand, five hundred and sixty-eight of the Code, relating to judgments of justices of the peace and with equal effect, and from the time of such filing it shall be treated in all respects as to its effect and mode of enforcement as a judgment rendered in the district court as of that date, and no execution can thereafter be issued from the said superior court on such judgment, and no real property shall be levied on, or sold on process issued out of the court created under the provisions of this act; and judgments of said superior court may be made liens upon real estate in other counties in the same manner as judgments in the district courts." Section 4089 makes judgments in the supreme and district court liens upon real estate; hence, if it were not for section 782, it might be said that under the jurisdiction conferred by sections 769 and 772 judgments of superior courts are also liens on real estate.

It is clear, however, that they are not liens upon real estate, unless made so as provided in said section 782; and that real estate can not be levied on or sold on process issued out of the superior court when transcript of its judgment has been filed in the district court. The pro-

vision of section 782 that "no real property shall be levied on or sold on process issued out of the court created under the provisions of this act," limits levies and sales under process of that court to personal property. The evident purpose of the statute is to preserve the evidence of judgment liens on real estate, and of titles based upon sales thereunder in the district court. The provision in said section 769 in regard to attachments from superior courts, that "where real property is levied on by writs of attachment the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk of the district court in like manner and with like effect as of levies made in the district court," emphasizes the view we have expressed. Our conclusions are, that in all civil matters, other than those excepted in section 769, superior courts have jurisdiction concurrent with the district court to try and determine the issues, whether at law or in equity, and to render judgments therein as fully as the district court might do; that, when an existing lien on real estate is established and foreclosed, the court may direct the property to be sold to satisfy the judgment; and that, in all cases, process for the sale of real estate to satisfy judgments of a superior court must issue out of the district court upon transcripts filed therein.

III. It will be seen from the statement of the case that the entire proceedings following the filing of the petition up to and including the sale were in pursuance of the agreement of all the parties, and that the sale was made in all respects in exact accordance with the manner and terms agreed upon; that no judgment had been entered prior to the entry of the agreement to sell, in the form of a decree, and that no judgment was entered, except that in favor of appellants, and no decree of foreclosure, before the sale in question was made. It does not appear that any process was issued out of the superior court for the sale of this property,

but that the commissioner proceeded to advertise and sell it in the manner and upon the terms agreed upon as expressed in the so-called "decree." In the proceedings to sell, neither the jurisdiction nor judgment of the court was invoked. It was not called upon to determine anything. Everything that was done was by agreement of the parties, and not by any exercise of power on the part of the court. The court had jurisdiction of the case, and the parties, agreeing upon a sale of the property because of its condition, appeared before it, and by common consent had their agreement entered upon the record of the case. The proceeding is unusual, in that the agreement of the parties is thus evidenced; yet the sale was not by virtue of any power exercised by the court, nor upon process issued by it, but exclusively by authority of the agreement of all the parties. Appellants cite cases wherein this court has held that, when a court has no jurisdiction of the subject-matter, jurisdiction thereof can not be conferred by consent, and argue that consent could not give jurisdiction to order the sale, and consequently no jurisdiction to approve it. In our view of the case the principle stated does not apply, as the sale was not by order of the court, but by consent of the parties. All parties in interest having agreed to a sale as made, they should be bound thereby, unless for good reason. Appellants show no reasons for setting aside this sale, other than those stated in the affidavit of appellant Anderson, and these we do not think are sufficient. That Mr. Anderson and Townsend & Son failed to agree upon a price for their bonds, or a combination for bidding in the property, is no reason why the other parties should be denied the benefit of the sale. Mr. Anderson knew that the property was being sold in pursuance of the agreement of all the bondholders, and not on process from the superior court; that the mortgage securing

the one hundred thousand dollars in bonds was prior to any judgments Mr. Dolan had; and that the property was appraised at thirty-one thousand dollars, and would not sell for the amount of the bonds. Knowing these facts, there was nothing in the notice of Dolan that should have deterred him or Mr. Suber, with whom he was acting, from bidding. That Suber withdrew from his arrangement with Anderson for an insufficient reason does not warrant us in saying that the sale, made as it was, should be set aside, and the agreement under which it was made ignored. Appellants, being parties to the agreement under which the sale was made, should not now be heard to question the sale for any reason shown in the record. **AFFIRMED.**

WM. IRELAND v. J. S. HUNNEL, Appellant.

Town Treasurer: MINISTERIAL ACT. A town treasurer can not refuse payment of an order allowed by the council and signed by the recorder, on the ground that the bill for which the order was issued should not have been allowed.

SIGNATURE TO ORDER. In the absence of an ordinance prescribing by whom orders on the treasurer should be signed, or upon whose order he should make payment, an order directed by the council to be issued, and attested by the recorder should be paid, though it be not signed by the mayor.

LOST ORDER, AUTHORITY FOR PAYING. Where a nonnegotiable order can not be produced on the trial but is fully identified in the record, a judgment ordering its payment authorizes the treasurer to pay it.

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION of *mandamus* to compel the defendant, as treasurer of the incorporated town of Eldon, to pay a certain order. Judgment was entered in favor of the plaintiff. Defendant appeals.—*Affirmed.*

W. H. C. Jaques for appellant.

Work & Blake for appellee.

GIVEN, J.—The evidence shows that the town council ordered a sidewalk to be constructed “from the north side of Elm street, along and upon the sidewalk ground, to the south side of Walnut street;” that on January 4, 1886, the bill of William Ireland was allowed by the town council, and an order drawn on the treasurer of the town of Eldon in favor of William Ireland for one hundred and twenty-five dollars, signed by the recorder. The treasurer refused to pay said order for the following reasons, as stated in his answer: That the town did not, and had not the right to, contract or pay for said sidewalk, for the reason that it was along the side of a county bridge in said town; that the treasurer has never been legally directed to pay said order; that one Huston is the owner thereof, and that, in a former proceeding to compel the mayor to sign said order, an order of *mandamus* was refused. The records of the proceedings of the town council are not as explicit as they should be, but it fairly appears therefrom that the sidewalk ordered was that constructed by the plaintiff; that the bill allowed was for that service, and the order drawn in his favor was for and on account of the amount allowed. The statute does not prescribe the duties of town treasurers, but confers power to do so, upon the council of incorporated towns. Code, section 514. At the time the order in question was issued, the town of Eldon had no ordinance providing by whom orders on the treasurer should be signed, or upon whose order the treasurer should make payments. It was for this reason that an order of *mandamus* was refused to compel the mayor to sign this order in favor of plaintiff. The recorder was the ministerial officer of the council, and, in the absence of

provisions to the contrary, was the proper officer to sign orders authorized by the council to be drawn on the treasurer. The treasurer was also a ministerial officer of the corporation, and, in the absence of statute or ordinance defining his duties, was chargeable with those duties usually pertaining to his office. The town council had authority to allow bills, and order their payment by the treasurer, the receiving and disbursing officer of the corporation. The recorder, as clerk of the corporation and council, was the proper officer to attest the order of the council by his official signature. The record discloses, as the real reason why appellant refused to pay this order, that the walk was built along side of a county bridge. Whether the town council decided rightly on plaintiff's bill was not for the treasurer to determine. High, Extr. Rem., section 356, and cases cited. Under the facts, the law enjoined on appellant, as a duty resulting from his office, the payment of said order. He has refused to perform this duty, and *mandamus* is the proper remedy. It appears that, at the time of the trial, the order in question had been mislaid, and could not then be produced. The court ordered the payment of the amount of the order by the treasurer, and that "these presents being his sufficient warrant therefor." The order was not payable to order or bearer; it was fully identified in the record, and the judgment is sufficient authority to the treasurer to pay the amount. Other questions discussed are disposed of in the foregoing views. The judgment of the district court is AFFIRMED.

SARAH E. STRONG, Appellant, v. A. GARRETT *et al.*

Homestead: WHEN SUBJECT TO EXECUTION. A widow with children elects to retain the homestead for life, in lieu of her distributive share in the real estate of her late husband. One child dies and its portion in the fee of the homestead descends to the mother. *Held*, that such portion may be sold on execution against the mother. GRANGER, C. J., *dissenting*.

Merger. The portion inherited from the deceased child does not merge in the mother's life estate.

Appeal from Louisa District Court.—HON. DAVID
RYAN, Judge.

TUESDAY, JANUARY 30, 1894.

ACTION in equity to set aside a sheriff's sale of real estate, and to enjoin the execution of a sheriff's deed. A demurrer to the petition was sustained, and, plaintiff electing to stand on her petition, judgment was rendered in favor of the defendants for costs. The plaintiff appeals.—*Affirmed.*

Newman & Blake and *Fred Courts* for appellant.

John Hale for appellees.

ROBINSON, J.—The material facts alleged in the petition and admitted by the demurrer are substantially as follows: Plaintiff is the widow of R. S. Strong, who died in the year 1875. During his lifetime he became the owner of the northwest quarter of the northeast quarter of section 8, township 73, range 2, in Louisa county, and he and the plaintiff occupied it as their homestead until his death occurred, in 1875. In December of that year, the plaintiff, as the widow of decedent, elected to retain the premises described as a homestead, for life, and, on her application, an order that she so retain it was made by the circuit court of Louisa county. Since that time, she, with the children of her late husband, have continuously occupied the premises as a homestead. Seven children of the deceased survived him, and were the owners in fee of the premises, subject to the right of plaintiff to possess and occupy it during life. In December, 1881, one of the daughters of decedent died, unmarried, leaving as her sole heir the plaintiff. In April, 1880,

the defendant A. Garrett obtained a judgment against the plaintiff in the district court of Louisa county, and afterward caused an execution issued thereon to be levied upon an undivided one seventh of the premises described, subject to her homestead rights, as the interest she had acquired from the deceased heir of her late husband. The interest so levied upon was sold in December, 1890, to the judgment creditor, for a portion of the amount due on the judgment, and a certificate of purchase was issued to him. The indebtedness on which the judgment was rendered was contracted after the premises in question were occupied by plaintiff and her husband as a homestead. This action is brought against Garrett and the sheriff to set aside the sale, and to restrain the sheriff from executing a deed thereunder.

The question we are required to determine is, whether the interest in the premises which plaintiff acquired by the death of her daughter was subject to sale under the judgment described. The plaintiff rightly claims that the judgment was not a lien upon her homestead right, and she contends that the undivided one seventh of the premises in fee was merged in her homestead right, and thus became exempt from the lien of the judgment, and from the execution to satisfy it. A merger occurs when a greater estate and a less coincide and meet in one and the same person without any intermediate estate. In such a case the less is merged in the greater estate, not the greater in the less. An estate for years or for life would be merged in an estate in fee; and, as a general rule, the different estates must be held in the same legal right. 2 Bouv. Law Dict., tit. "Merger;" 4 Kent, Comm. [10 Ed.], 114; 15 Am. and Eng. Encyclopedia of Law, 313, and authorities therein cited. In 4 Kent, Comm., 116, it is said of the merger of estates: "If they are held in different legal rights, there will be no merger,

provided one of the estates be an accession to the other merely by the act of law, as by marriage, by decent, by executorship or intestacy. This exception is allowed on the just principle that, as merger is the annihilation of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, infants, legatees, husbands or wives." Under the rules cited the only merger which could have occurred in this case under any permissible view of the law, is that of the homestead right in the estate in fee to an undivided one seventh of the premises described. That such a merger would not have been for the interest of plaintiff is apparent, unless the estate remaining would be exempt from sale under the judgment in controversy. Upon the death of the husband or wife in whom the legal title to a homestead is vested, the title thereto descends to the heirs of the decedent, subject to the rights of the survivor. *Cotton v. Wood*, 25 Iowa, 48; *Burns v. Keas*, 21 Iowa, 257. Where the survivor elects to retain the homestead for life in lieu of his distributive share in the real estate of the intestate, who, in this case, left children surviving, the interest of such survivor in the homestead is thereby limited to the right to use and occupy it during his lifetime. *Smith v. Zuckmeyer*, 53 Iowa, 14, 3 N. W. Rep. 782; *Whitehead v. Conklin*, 48 Iowa, 478. In such a case there are two estates in the homestead—one for life in the survivor, and one in fee in the heirs, subject to the life estate. The title in the heirs is vested, although without the right of immediate possession, and may be alienated by them. Judgments in the supreme and district courts of this state are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment. Code, section 2882. In construing the statutes of this state "the word 'land,' and

phrases 'real estate' and 'real property,' include lands, tenements, hereditaments, and all legal rights thereto, and interests therein, equitable as well as legal." *Id.*, section 45, subdivision 8. Under these provisions the interests of heirs not in possession, but in whom the title to real estate is vested, may be seized and sold under execution. See 1 Freem. Ex'ns, sections 178, 183; *Moore v. Littel*, 41 N. Y. 66; *Woodgate v. Fleet*, 44 N. Y. 1; *Dodge v. Stevens*, 105 N. Y. 588, 12 N. E. Rep. 759; *Arzbacher v. Mayer*, 53 Wis. 388, 10 N. W. Rep. 440. It is the policy of our law not to exempt homesteads from sale on execution to satisfy debts contracted before the homesteads were acquired. Code, section 1992. The interest derived by plaintiff from her deceased daughter was subject to execution while owned by the daughter, and was not merged in the estate already possessed by the plaintiff, but remains separate and distinct. It is not essential to the homestead right, but may be transferred without in any manner affecting it. A sheriff's deed, issued pursuant to the sale in question, will give to the grantee no right of possession until the life estate of plaintiff shall have been terminated. There is no reason in the policy of the law for holding the interest in question to be exempt, and we conclude that it was subject to this sale which has been made. It follows that the demurrer was properly sustained, and that the judgment of the district court must be AFFIRMED.

GRANGER, C. J. (*dissenting*).—I am not able to concur in either the reasoning or conclusion of the majority opinion. I make no contention with the rule announced as to the merger of estates generally. I do not, however, think it of vital importance in this case. I regard the question involved as a purely statutory one. The homestead right, even though it may be regarded as an estate in legal contemplation, is of that

peculiar kind which exists rather as incidental to, than independent of, other estates. An estate in fee for life or for years may be invested with a homestead character by the manner of its use, and the homestead character is lost when the use is abandoned, although the estate to which it attached continues. While the homestead right obtains, the law treats the entire estate vested in the head of the family as the homestead, and protects it in all respect from judicial sale. This protection extends to the legal title. By Code, section 1988, it is provided: "Where there is no special declaration to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale." This exemption, as I have said, extends to the entire estate of the head of a family to whom the homestead right is given. The statute does not exempt from such a sale the mere right of homestead occupancy, but the homestead. No one would contend for a different rule in the ordinary case of homestead occupancy. The true import of the majority opinion will best be seen and understood by extending the rule of it so that the consequences will be more apparent; and it is from such a standpoint that we may properly consider it. Let us suppose that Strong had left but the one child, so that, instead of one seventh, it would have taken the entire title to the homestead. Upon the death of that child the title and homestead right would have vested in the wife or widow. By the rule of the majority opinion, the homestead, except the mere right of occupancy, could be sold at judicial sale. It could not have been done when the homestead right and title united in the husband, because of the statute exempting the homestead from judicial sale. Why not exempt it when such title and right unite in the wife? If we abide by the statute, we must hold it exempt from such sale, unless there is a "special declaration to the contrary."

The statute contains some such declarations as that homesteads may be sold for debts contracted prior to the purchase thereof. Code, section 1992. But such a sale is of the homestead, and not of the mere legal title. It is also specially provided that homesteads may be sold for debts created by written contract, etc. *Id.*, section 1993. Nowhere do I find a declaration of the statute that the fee title may be sold at judicial sale where it is owned by the husband or wife having a homestead right therein that is protected. The title to this land has at all times been protected from judicial sale because of the homestead right in the head of the family. It was thus protected, while in the daughter, as to antecedent debts, and comes to the wife unaffected by any attaching interests. Had the title passed with the homestead right directly from the husband to the wife by devise or by operation of law, I do not think there would be a doubt that the homestead would be protected to her as the head of a family, as it was in him. The only distinction is that in this case the course of the legal title has been less direct, but not in a way to induce different consequences. I think that the title in the wife should be protected.

CHRISTINA BURG, Administratrix, Appellant, v. THE
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY.

Railways: Duty to Trespasser: YOUNG CHILD. While an engineer is not bound to stop his train whenever he sees a human being on the track, unless he has reason to believe that it will not leave the track, and much less so if he has doubt as to what the object seen is, yet he is bound to assume, when he sees small children on the track, that they will remain, and he is at once charged with the highest degree of care on their behalf. (7)

License to Use Track. The mere fact that persons, for years, with defendant's knowledge, use the track, does not establish that the use of the same was licensed by defendant. (2)

90	108
93	252
94	432
90	108
95	172
95	309
90	108
101	94
90	108
d103	654
90	108
109	18
109	820
e109	634
90	108
114	174
114	176
90	108
f126	239
90	101
128	396
90	108
131	744
90	101
135	59
90	108
141	641

RULE TO LOOK OUT: APPLICATION OF. A rule that crews on extra and delayed trains should keep "a sharp lookout for section men and others who may be obstructing the track," does not apply to trespassers. (3)

EX PARTE TEST: COMPETENCY IN EVIDENCE. On the question whether the train could have been stopped after deceased could have been seen by the engineer, evidence of tests made by defendant under similar circumstances, is admissible, though plaintiff was not present at the tests. (5)

Books of Science. An extract from a treatise on the distance requisite to stop trains, which does not give the size of the train, the pressure applied to the brakes nor the character of the grade, is not admissible under Code, section 3653. (4)

SAME: "RAILWAY AGE." While the "*Railway Age*" contains articles of historical value and others pertaining to science and art, it is not such a work of history or book of science and art as Code, 3653, contemplates. (4)

SAME: DISPARAGEMENT BY COURT. It is not error for the court to disparage the probative value of a work which should not have been admitted at all. (4)

Ordinance: Reasonableness: SPEED OF TRAINS. A train running at a speed greater than allowed by an ordinance of the city of Des Moines killed a child at a point which was not within the city when the ordinance was passed, on both sides of which point, for a long distance, no platted streets were open across the track, and where the right of way was fenced on both sides. *Held*, that as to the place of the killing, the ordinance was unreasonable and void. (1)

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

WEDNESDAY, JANUARY 31, 1894.

THE plaintiff is the administratrix of the estate of Peter Burg, Jr. Peter Burg, Jr., was a child three years of age, in October, 1890, living with his parents near the line of defendant's road within the city limits of Des Moines, some three miles west from the passenger depot in the city. On the eleventh day of October, 1890, Peter Burg, Jr., with his sister, a child about nineteen months old, left the home of their parents, some one hundred and sixty-three feet south of defendant's track, went upon the track, and sat

down between the rails, and while playing there they were struck by defendant's train, and killed. This action is to recover damage because of the death of Peter Burg, Jr. In the district court there was a judgment for the defendant, and the plaintiff appealed. *Affirmed.*

Cole, McVey & Cheshire for appellant.

Cummins & Wright and *Geo. E. McCaughan* for appellee.

GRANGER, C. J.—I. In the city of Des Moines is an ordinance limiting the rate of speed of trains to six miles an hour. Plaintiff offered in evidence the ordinance. It was excluded under an objection that it was "incompetent, immaterial, and for the reason that the evidence already shows that the place where the accident happened was so far removed from a crossing as to render the ordinance unreasonable, even if it was in force." When the ordinance was adopted, the place where the accident happened was not in the city of Des Moines, the city having been since, by an act of the legislature, enlarged so as to embrace that place, with other territory. It will appear from this fact that the ordinance was not adopted as being, in the judgment of the council, a reasonable regulation for the operation of trains at the point in controversy. It is not to be understood that the ordinances of the city do not apply to it as enlarged; but, in determining the question whether or not the ordinance is so unreasonable as to be of no validity at the point in question, importance may be given to the fact of whether or not the act, at the time of its passage, was designed or intended as having force there, for, if not, the legislative sanction comes from the fact that the ordinance stands unrepealed after the territorial change in the city, rather than from legislative action based upon known

conditions. How far such a fact should, or might, properly influence a judicial determination of the question of the unreasonableness of an ordinance, as bearing on its validity, is not, perhaps, to be definitely stated, nor would it likely be the same in all cases. At the place where the accident occurred, there was no greater necessity for such a limit on the speed of the train than in very many places outside the city or station limits. East of the point some two thousand, eight hundred feet are brickyards, where there is an opening for men and teams to cross the track. From this point west, some two miles beyond the place of the accident, the defendant's right of way is fenced. It is also fenced through West End addition to the city of Des Moines, which is over one thousand, two hundred feet east of the place of the accident, and in this addition the platted streets do not cross the railway track. Along where the accident happened, on both sides of the track, there are no residences, except that of Burg, it being about a fourth of a mile from any other, and the land is wooded and uncultivated on both sides of the road, except a small piece near the house of Burg. This case comes clearly within the rule and reasoning of *Meyers v. Railway Co.*, 57 Iowa, 555, 10 N. W. Rep. 896. Some importance is attached to the facts of the platted West End addition and the brickyards crossing just east of it. They are not of such importance as to change the rule. In the addition, there are but a few buildings,—seven in all,—and, as we have said, the streets, as opened, do not cross the right of way, which is fully protected by its fences. The brickyards crossing is some two thousand, eight hundred feet east of the point of the accident, and could not in any way affect the reasonableness of the rate of speed at that point. After leaving the brickyards crossing, if not before, the train had passed the conditions as to settlement and the business of the city

which demanded the limit upon train speed that is imposed by the ordinance. The city, as enlarged, is nine miles in width, requiring, under the limitations of the ordinance as to rate of speed, one hour and thirty-five minutes to make the distance, when, without any opportunity for dispute, for a part of the distance the limit is absolutely unnecessary. As is said in *Meyers v. Railway Co.*, *supra*: "The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole traveling public." It is, however, urged that the action of the city council is conclusive as to the validity of the ordinance.

The *Meyers case* cited involved the validity of an ordinance in the city of Council Bluffs, which city is under a special charter which does not, in express terms, grant to the council power to regulate the speed of trains, but the authority so to do is implied from other express powers granted. The city of Des Moines is incorporated under the general incorporation laws of the state, and the law, in express terms, confers authority upon cities incorporated under it to regulate the speed of trains within their limits. It is said that the power of courts to inquire as to the reasonableness of such ordinances is limited to cases in which the ordinances are adopted under an implied authority. In the *Meyers case* the authority of the court to determine the reasonableness of the ordinance is not questioned. The case, however, cites as authority the rule announced in 1 Dillon on Municipal Corporations, section 319, that: "In this country the courts have often affirmed the general incidental power of a municipal corporation to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state." The citation is but a recognition

of the rule of such interference by the courts where the action of the council is upon implied authority only. Its only application to this case is that it does not announce the rule as applicable to cases of express as well as implied authority, leaving, perhaps, the inference that in cases of express authority a different rule might obtain. It is true that the rule as stated in Dillon on Municipal Corporations, because of the specification as to implied powers, would seem to exclude from its operation cases in which the ordinances were adopted under express authority. Such a rule obtains in statutory and perhaps, to a greater or less extent, in general legal interpretations. Counsel for appellant cite numerous authorities, some of which support the rule of their contention, while others, as we view them, do not. No less can be said than that the authorities are in conflict. In the case of *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. Rep. 652, which was a criminal prosecution for the violation of an ordinance licensing peddlers, adopted under an express authority, this court said: "The power to regulate and license peddlers is unquestioned. It is expressly conferred by section 463 of the Code. But the power can be exercised only under an ordinance; and if the ordinance is passed for such purpose, and is such that the court must, upon a mere examination of its terms, declare it unreasonable, it is void." The case cites, for its support, Dillon on Municipal Corporations, section 254, which in the fourth edition is section 320, following the one heretofore quoted from, and the two sections are designated as "on the same subject." It will thus be seen that this court is committed to a broader rule than that of appellant's contention. As bearing on the case, see *Gray v. Land Co.*, 26 Iowa, 387; *Williams v. Carey*, 73 Iowa, 194, 34 N. W. Rep. 813; *Hayes v. City of Appleton*, 24 Wis. 542; *Clason v. City of Milwaukee*, 30 Wis. 316. *Evison v. Railway Co.*, 48 N. W. Rep. 6, is a

Minnesota case, and its similarity to this case is quite striking. The authority to the city council to regulate the speed of trains was expressly granted. We quote the following from the opinion. "A mere statement of these facts ought to be conclusive that, as applied to this part of defendant's road, the ordinance is so manifestly unnecessary to the protection of health and property that no two minds could reasonably differ upon the question. According to the map, which is made part of the record, the limits of the city must be about nine miles in length by seven in breadth, embracing much land that is not even platted, and hence presumably unimproved, or else devoted to purely agricultural purposes; and it is undoubtedly true that much of that which is platted on paper is in the same condition. To apply uniform, ironclad rules to the whole of this territory, that no train shall run over four miles an hour, is unnecessarily oppressive, and, if obeyed or enforced, would deprive the public of anything like reasonable suburban transportation." We think there was no error in excluding the ordinance under the objection made.

II. A demurrer was sustained to the following amendment to the petition: "That for a long period, to wit, for more than ten years, defendant's roadbed and right of way, from a point west of where the accident happened to the city of Des Moines, has been used by the public as a thoroughfare to and from said city of Des Moines, which fact was well known to the defendant and its employees; by reason of which it became the duty of the defendant and its employees to use greater diligence in looking out for persons who might be upon the track at this point, than if the defendant had not permitted such use of its tracks without objection, as it had done for said period of time." It will be seen that the first part of the amendment states facts, and the latter part conclusions therefrom. The

argument is to the effect that the amendment pleads a license on the part of the company to the public to use the track, and hence additional care on the part of the company is required. The facts stated are not such that the law would infer a license from them. The conclusion stated in the amendment, which indicates the intention of the pleader, is not the equivalent of a license. It states a legal conclusion resulting from a mere use of the track without invitation, or even consent. Such facts do not show a license, nor do they create obligations on the part of the company towards persons so using the track. We are not saying that there might not be such a use of the track as that the assent of the company might be understood or implied therefrom; but no such state of facts is pleaded. See *Richards v. Railway Co.*, 47 N. W. Rep. 63; *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. Rep. 776. There was an offer of evidence to show such a use of the track as would amount to a license on the part of the company, which was refused. The above considerations will dispose of that question. The offer was not of particular facts, so that the court could judge of their sufficiency for that purpose, but a mere offer to prove facts that would show a license. The court could rightfully assume that the facts stated in the amendment offered were those relied on, and those were insufficient.

III. Plaintiff filed an amendment to her petition, setting out a rule of the company, as follows: "All extra trains or engines and delayed regular trains must sound the whistle on approaching curves and obscure places, where the view is not clear for at least half a mile, and keep a sharp lookout for all work trains, section men, and others who may be obstructing the track." To the amendment there was a demurrer, which the court sustained. The point of contention is as to the application of this rule to this case,—that is,

was it intended to apply to persons wrongfully on the track? We think the universal current of authority is that it has no such application. In the case of *Railway Co. v. Howard's Adm'r* (reported in 19 Am. and Eng. R. R. Cases, 98) in determining the admissibility of such a rule in evidence, it is said: "Rules and regulations adopted by the company for the preservation of its passengers and trains do not apply to trespassers on its road whose own wrongful and negligent conduct places them in danger; and the only obligation or duty on the part of the company or its employees in such a case is, when made aware of the danger, to avoid inflicting any injury if, by the exercise of ordinary diligence, they could prevent it." It is hardly to be doubted that the company had in view, in promulgating the rule, only such obstructions to the track as might arise from the conduct and management of the road, and not obstructions not in reason to be anticipated. See *Harty v. Railway Co.*, 42 N. Y. 468; *Railway Co. v. Spearen*, 47 Pa. St. 300.

IV. The American Mechanical Dictionary was, by the testimony of the state librarian, shown to be a standard scientific authority on the subjects treated therein. An extract therefrom was offered in evidence, treating of the mechanical appliances for stopping trains and the distance required therefor, and, against objections, admitted; but the court took occasion to comment on the value of the extract as evidence, saying that it was "not very satisfactory evidence;" stating that it did not give the size of the train, the pressure applied to the brakes, the character of the grade,—in short, that it did not appear what the conditions were under which the trains were stopped. The court admitted the extract under the rule of the statute providing that historical books, books of science or art, etc., when made by persons indifferent between the parties, are presumptive evidence of facts of general

notoriety or interest. Code, section 3653. Whether or not the distance in which a train may be stopped under given conditions is a fact of such general notoriety or interest that such evidence would be competent we need not consider, for we think the reasons given by the court why the evidence was not very satisfactory were reasons why it should have been excluded. The negligence of the defendant was not claimed to be in the equipment of its train, so that no question arises as to that fact. The entire absence of facts showing the conditions under which the trains spoken of in the extract were stopped, rendered the extract of no avail whatever in determining the fact of negligence in stopping the train in question. The facts disclosed were not such as could give to the extract the force of presumptive evidence as contemplated by law. If it should not have been admitted, the remarks of the court in disparagement of its value could not have been prejudicial.

V. The plaintiff offered in evidence a record of tests made between the Westinghouse brake and Evans driver brakes, and also one of the tests made at twelve principal cities of the United States, giving results of the Westinghouse brake. These records were contained in the *Railway Age*. The offer was made under the provisions of Code, section 3653. The basis of the offer was the testimony of one Webster, who is a locomotive engineer. He said he was acquainted with the publication; that it was "recognized among railway men as a standard authority on railway matters; as a scientific journal on matters of which it treats,—railways and their appliances." His further testimony shows that the paper is devoted to the advertisement of numerous mechanical devices that are patented from time to time, that it gives puffs in reference to various contrivances that are used in mechanics, and that it contains recommendations of various mechan-

ical devices. The witness said: "I would not want to swear to it any more than I would to the *Iowa State Register*. It sustains the same relation to railroads as the local paper does in local matters. It contains editorials on different subjects. It gives the opinion of the author upon this and that subject." The publication is not an historical work, nor a book of science or art. It undoubtedly contains articles of historical value, as well as those pertaining to science and art. This is true of very many leading periodicals of the country that do not come within the purpose of the statute giving to works of history and books of science and art a value in judicial proceedings which is the equivalent of a legal presumption. The court properly excluded the publication.

VI. Two very important questions in the case are these: *First*, the distance at which the children could first be seen by the engineer of the approaching train; and, *second*, the possibility of stopping the train, so as to prevent the accident, after the situation was, or should have been, known. Before reaching the point of the accident, there is a curve in defendant's road, and it is when coming out of or around this curve that the point can first be seen. As to the distance at which the point can be so seen, the parties are in dispute; the plaintiff claiming that the engineer saw the children a distance of seven hundred and forty-three and two tenths feet, and the defendant that they could not be seen at a greater distance than from five hundred to five hundred and fifty feet. The engineer admits that he saw the children at a distance of from four hundred to four hundred and seventy-five feet. The accident occurred in October, 1890. In January, 1891, and again in May, 1891, the defendant made certain tests with trains to ascertain the distance at which the children could have been seen, and also the distance required to stop the train when running at the same

rate of speed as the train did on the day of the accident. The tests made in May were with the same train in use when the accident happened. Those in January were made with a train claimed to be substantially like the other. These tests were made without notice to the plaintiff. The court admitted proofs of these tests against the objections of the plaintiff. It is urged that the conditions were so dissimilar as to render the tests incompetent. It is true that they were not identically the same, but they were essentially so. It was at the same place, on the same track; in one case with the same train, and in the other with one so like it that it is not to be seen that it would not furnish a test sufficiently correct to be an aid in determining the fact to be found in the case. It is urged that the accident occurred about noon, and that the January test was made in the afternoon, when the sun would prevent seeing an object on the track. That does not appear to have been true in fact. So far as the record discloses, the opportunity for seeing at the different times was equally good. In fact, we do not discover a difference as to conditions in any substantial particular. We think these tests were proper, and, if fairly made, the facts thereby disclosed would be of great value in reaching a conclusion. We can not adopt appellant's view that it was an attempt to "manufacture *ex parte* testimony." Instances are without number where, pending litigation, the parties have made test measurements and trials relating to facts in dispute, and they have been regarded as competent, and a quite satisfactory class of evidence upon questions of fact, and we are not favored with a suggestion against the reason of such a rule. Upon the question of admissibility of such evidence, courts have never assumed that it was "manufactured," in the sense in which the term is used in argument, and for that reason excluded it, even where the acts are those of the parties. Parties are made competent wit-

nesses, and their testimony is admitted with the same legal presumptions as that of other witnesses; but, in weighing the evidence, all facts, including interest, that might reasonably affect its value, are to be considered. It is not the law that in making such tests, measurements, etc., the opposite party is entitled to notice in order that he may be present. It is the right of each party, in the preparation for trial, to take all legal steps in the way of being able to meet the issues of fact by proofs; and in preparing for the presentation of his evidence no notice to the adverse party is required. It is not for us to say, because this is a corporation owning the road and means for making the tests, that it is exempted from the general rule,—that is, that it shall not use these means with a view to demonstrating the truth. When they are used, the circumstances of their use, including motives for, and all indications of, an unfair or impartial use, are matters that may lessen the value of the testimony. The case of *Klanowski v. Railway Co.*, 31 N. W. Rep. (Mich.) 275, is relied upon by appellant. It is not a case of authoritative force, because of a division of the court; it appearing that but two of the four judges sitting concurred upon the particular point cited. We are referred to the case of *Brooke v. Railway Co.*, 81 Iowa, 504, 47 N. W. Rep. 74, upon a question of experimental evidence wherein the plaintiff made the test, sustaining the right to do so. In *Nosler v. Railway Co.*, 73 Iowa, 268, 34 N. W. Rep. 850, the same rule was held in favor of the plaintiff against the company, and under circumstances equally doubtful as to a similarity of facts. We think the following statement in *Railway Co. v. Mugg*, 31 N. E. Rep. (Ind. Sup.) 564, is quite to the point: "Under some circumstances this class of testimony may be very satisfactory, but, unless the experiments are shown to have been made under essentially the same conditions, the tendency is to confuse and mislead, rather than enlighten, the jury." While

the conditions need not be identically the same, they should be essentially so; and the important fact to have in view in passing upon the admissibility of such testimony is, will it aid, rather than confuse, the jury in reaching its conclusions. With that as the rule, we think the testimony in this case was properly admitted. It may be added that the court, in a very appropriate instruction, guarded against ill effects from the evidence because of varying conditions.

VII. The following instructions given by the court are made a ground of complaint in a single branch of the argument: "5. You are instructed that when and after the engineer saw the object upon the track, and discovered that the object seen was the deceased, it became his duty to use all the care and diligence that an ordinarily prudent and careful person would have used, under the circumstances in which he was then placed, to stop said train in time to save the life of said Peter Burg, Jr.; and, if you shall find that he did use such care and diligence in trying to stop said train, there was no negligence in stopping said train for which the defendant can be held liable." The next instruction (sixth) states the opposite of the rule, to the effect that if he failed to use such care and diligence he would be negligent, and the defendant liable. The following is the seventh instruction: "If you shall find from the evidence that the engineer, when he first saw the deceased upon the track, honestly thought it was an inanimate object, or was in honest doubt whether the object seen was a human being, then and in that case you are instructed that it did not become his duty to thereupon stop his train; that such duty only arose when he discovered that the object seen by him was a human being, in such a position as gave the engineer no reason to expect that the person would remove from the position of danger he was then in." It will be well, in this connection, to state the rule as to the diligence

required of the engineer to know of the presence of the children on the track. The children were, in a legal sense, trespassers. They went upon the track, and sat down to play. The engineer was not bound to exercise any care with reference to such persons, and was under no obligation to act for their safety until they were actually discovered. *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. Rep. 776, was for the killing of a boy eleven years old, who, with another, had gone upon the track, and was "playing or lounging there." It is said in the opinion by Chief Justice ADAMS: "But the plaintiff contends that the boy might, and should, have been seen sooner. It seems not improbable that he might have been seen a little sooner, but no locomotive engineer is bound to watch out for trespassers on the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications." The case cites a number of authorities on the question, and the rule is an undoubted one. The settled rule being that the duties of the engineer with reference to saving the lives of the children commenced when he actually knew of their presence on the track, we may inquire as to the correctness of the rule stated in the instructions. It is said that the instruction "told the jury that those in charge of the train were only required to use ordinary diligence in trying to stop the train, and save the lives of the children, after they saw the children, and knew they were human beings." As we interpret the statement in argument, it does not state the rule of the instruction. The rule of the instruction is that when the child was discovered (and this, under the law, was when the engineer became charged with diligence) he must use all the care and diligence that an ordinarily careful and prudent man would have used, under the circumstances in which he was then placed, to stop the train. What is the care and diligence that a reasonably careful and prudent man

would have used under such circumstances? Not a mere ordinary effort to stop the train, but the use of every means at his command—an exercise of the highest degree of care and diligence. Such an effort or exercise of care would be the natural promptings of an ordinarily prudent man under such circumstances. The law requires, at all times, that persons should act with reasonable care and diligence; but what acts will constitute reasonable care and diligence depends upon the circumstances in different cases, and, as circumstances vary, so will requirements as to reasonable care and diligence. In another instruction the court explained the rule, so that its proper application by the jury is not doubtful. The complaint as to the seventh instruction is that under it “the engineer might have believed the objects he saw were children, but yet entertained some doubts that they were,” and that the jury was told that “the engineer was under no obligation to stop the train until he knew they were children.” The gist of the instruction is that the engineer was not required to stop his train until he knew that the object on the track was a human being, and then only when he had reason to believe it would not leave the track. The phrase as to an honest doubt does not change its effect. It is not the law that, when a human being is discovered on the track, an engineer must stop his train, and much less so when he merely sees an object as to which he has doubts. But when it is discovered, and he has reason to believe that for any reason it will not leave the track, he must stop the train, if necessary, for its safety. An engineer may rightfully presume that a person on the track will leave it on the approach of a train, until the contrary is in some way manifested. Of course, when the engineer knew the fact of these small children being on the track, he had sufficient reason to know that they would remain, and he was at once charged with the highest

degree of care in their behalf; and this is the theory upon which the cause was submitted. The occurrence was sadly unfortunate, but the misfortune is not the fault of the railroad company. Its track was made a playground by the children, probably without the fault of anyone, as they were themselves under years of discretion. The misfortune does not, of itself, create a liability for damages. It was really, in view of the circumstances, unavoidable. Had the court, at the close of plaintiff's direct evidence, directed a verdict for the defendant, its action would not have been disturbed, as there was absolutely a failure to show negligence on the part of the defendant. Other questions argued are controlled by our discussions, to some extent, and as to others we find no error, and they are not of such importance that this opinion should be extended to consider them. The judgment is **AFFIRMED**.

MARTHA J. BUNYAN V. MARTIN LOFTUS, Appellant.

Sale of Intoxicating Liquors: VERDICT NOT EXCESSIVE. A verdict of one thousand dollars will stand against one of several who sold liquor to a man who was reduced thereby from being a prosperous business man to a sot, who exhausted his property, virtually ruined his business, squandered, the means of supporting his wife and all of which led to his abusing his wife. (9)

Amendment During Trial. Where plaintiff files an amendment to petition merely specifying the manner in which sales to her husband have injured her, defendant, not having moved for a continuance, can not object thereto. (4)

Instructions: NOT INCONSISTENT. An instruction limiting plaintiff's recovery, at all events, to sales made within two years before commencement of suit, is not inconsistent with another, that if no sales occurred up to a certain point of time within the two years, recovery was limited to after that point of time and before the beginning of suit. (5)

SAME. The court need not define the word, "contributed," used in an instruction. (7)

90	122
91	584
90	122
98	340
90	122
102	55
102	495
103	197
90	122
105	482
90	122
105	79
90	122
112	582

Admission of Evidence: ERROR CURED. Admitting evidence as to the number of plaintiff's children is cured by an express instruction telling the jury what it should consider in determining the liability of the defendant, which does not make the number of children an element. (8)

Stipulation as to Transcript: EFFECT OF. A stipulation that a certain transcript of the notes made by the reporter, certified by the clerk as such, may be filed in the appellate court as the only transcript to be filed under appellee's denial of appellant's abstract, "appellee merely intending to question the correctness of the record as to the evidence in the cause," merely dispenses with the clerk's transcript of the reporter's translation, and does not preclude appellee from objecting that the evidence has not been properly preserved. (2)

Shorthand Notes: How Made of Record. Where the shorthand notes are filed in the clerk's office properly certified by the judge and the reporter, they become a part of the record without any direction to that effect in the judge's certificate. (2)

Translation: TIME OF FILING. Where the notes, in a law action, are filed with the clerk in time, duly certified by judge and reporter, they become a bill of exceptions, and it is not material that a translation thereof is not filed until after the time allowed wherein to settle a bill of exceptions. (2)

Amended Assignment of Errors: WHEN NOT STRICKEN. An amended assignment of errors filed without leave, after appellee's argument, will not be stricken when appellee is not prejudiced or submission delayed, and where the amendment is in furtherance of justice. (3)

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

WEDNESDAY, JANUARY 31, 1894.

ACTION for damages resulting to plaintiff from the sale of intoxicating liquors to her husband.—*Affirmed.*

W. J. Roberts for appellants.

Craig, McCrary & Craig and *J. G. Garretson* for appellee.

KINNE, J.—I. Plaintiff sues for the sum of five thousand dollars damages, which she claims to have

sustained by reason of the unlawful sale of intoxicating liquors to her husband. It is alleged that the defendant Roger Loftus was the owner of the premises in which defendant Martin operated his saloon, and sold the liquors, and had full knowledge of said illegal sales. Plaintiff asks that the judgment be made a lien upon the real estate thus used. Defendants denied every allegation in the petition. The cause was tried to a jury, and a verdict returned for one thousand dollars, on which judgment was entered. Defendants appeal.

II. Appellee files a motion to strike the evidence, on the ground that it was never preserved by bill of exceptions or otherwise. In a stipulation filed in this court by the parties it is agreed "that the official reporter's transcript of the original shorthand notes filed in the court below on June 4, 1892, certified by the clerk of the court below that it is such transcript, may be filed in this court as the only transcript required to be filed by appellee under its denial of appellants' abstract, appellee merely intending to question the correctness of the record as to the evidence in the cause." It is claimed that by this stipulation appellee is precluded from raising the question as to whether the evidence has been properly preserved. We do not think that is a proper construction of the stipulation. In its absence, the appellants would have been required to have the clerk of the district court make a transcript of the translation of the reporter's notes, and to have filed it in this court. The only effect of the stipulation was to dispense with that, and in lieu thereof to permit the translation of the notes made by the reporter to be filed in this court, after being certified by the clerk as being correct. Leaving out of consideration, for the time being, the effect of the order of the court giving time to settle a bill of exceptions, and appellants' failure to act thereunder, was the evidence properly preserved? We need

not set out the certificates of the reporter and judge. Both certified to the notes and fully identified them as being the notes taken by the official reporter on the trial of this case in the district court. The only objection now raised, as we understand it, is that the judge's certificate is insufficient because it contains no direction expressly making the notes a part of the record. No such direction was necessary. The statute provides that "the original notes of any testimony taken in any case shall be filed in the office of the clerk of the court and become a part of the record in said case." Chapter 195, section 2, Acts, Eighteenth General Assembly. If the shorthand notes are properly certified by the reporter and judge, and are filed within the proper time, they become a part of the record by virtue of the statutory provision above quoted, and without a special direction to that effect by the judge in his certificate. Cases are cited in which the judge's certificate expressly directed that the evidence certified be made a part of the record. (*Hurlburt v. Fyock*, 73 Iowa, 477, 35 N. W. Rep. 482; *Fleming v. Stearns*, 79 Iowa, 256, 44 N. W. Rep. 376;) but it was not held in these cases that such a direction on the part of the judge was necessary. In *Runge v. Hahn*, 75 Iowa, 735, 38 N. W. Rep. 389. REED, J., says: "The certificate of the judge, when it properly identifies the evidence, has the effect to make it part of the record. It is not essential * * * that it contain an express declaration or order making the evidence part of the record, but that result follows when it identifies the different items of evidence offered and introduced on the trial, and is signed in due time." The language above quoted has no reference to the time of filing the translation of the notes. We come, then, to the consideration of the question as to the effect, under the circumstances, of failing to settle a bill of exceptions within the time ordered by the court. The short-

hand notes, certified as we have stated, were filed March 23, 1892. The motion for a new trial was overruled April 2, 1892, and at that time the court ordered that the bill of exceptions be settled by May 1, 1892. No bill of exceptions was made or settled. The translation of the reporter's notes was filed June 4, 1892. There was no certificate of the judge to the translation of the notes. Now, the translation of the shorthand notes was not filed until long after the time allowed in which to settle a bill of exceptions. Section 2831 of the Code provides that bills of exceptions must be filed during the term, "or within such time thereafter as the court may fix; but in no event shall the time extend more than thirty days beyond the expiration of the term, except by consent of the parties or by order of the judge." We have held that no time is fixed by statute within which the transcript of the reporter's notes must be filed in a law action, but it will suffice if it is done within the time a transcript is required to be made by the clerk. *Warbasse v. Card*, 74 Iowa, 309, 37 N. W. Rep. 383; *Hammond v. Wolf*, 78 Iowa, 229, 42 N. W. Rep. 778; *Fleming v. Stearns*, 79 Iowa, 259, 44 N. W. Rep. 376. In *McCarthy v. Watrous*, 69 Iowa, 260, 28 N. W. Rep. 586, a law action, the shorthand notes certified only by the reporter, were filed at the conclusion of the trial, but the transcript of them was not filed until long after the time given in which to settle a bill of exceptions.

To this transcript there was attached an insufficient certificate of the judge. It was held that the certificate must be filed within the time fixed in the order of the court for settling a bill of exceptions. In *Wadsworth v. Bank*, 73 Iowa, 426, 35 N. W. Rep. 504, a law action, it appeared that within the proper time the reporter certified to and filed his shorthand notes, but they were not certified by the judge. After the expiration of the time given to file a bill of exceptions, a

translation of the shorthand notes, duly certified by the judge, was filed. It was held that while the translation of the notes, duly certified by the judge, might be regarded as having the effect of a bill of exceptions, such certificate must be made within the time prescribed by the order of the court. It will be observed that these cases are not like that at bar. In those cases it was sought to preserve the evidence by filing the notes certified only by the reporter, and afterward filing a transcript of them, duly certified by the judge. In such a case the evidence does not become a part of the record, so as to stand as a bill of exceptions, until the judge has certified to the translation of the notes. In the case at bar the reporter and judge both certified to the notes, which, as we have seen, constituted them a bill of exceptions, and these notes, thus certified, were filed even before the conclusion of the trial. We see no reason, under such circumstances, for holding that the evidence was not properly preserved. The motion to strike the evidence must be overruled.

III. A motion is made to strike the amended assignment of errors because filed too late. This amendment, while filed after appellee's argument, and without leave, appears to be in furtherance of justice. *Stanley v. Barringer*, 74 Iowa, 36, 36 N. W. Rep. 877. In this case it does not appear that the submission of the case in this court has been delayed, or that appellee has been prejudiced thereby. The motion will therefore be overruled. *Hall v. Railway Co.*, 84 Iowa, 311, 51 N. W. Rep. 150.

IV. During the introduction of plaintiff's evidence she filed, with leave of court, an amendment to her petition, alleging that by reason of the wrongful sales of liquor to her husband she had been damaged in her means of support, and in loss of the business and property with which her husband supported her and her family. Error is assigned on the overruling of a

motion to strike this amendment. The ruling was proper. If defendants were prejudiced thereby, they could have made a proper showing for a continuance. They did not do so, and ought not now to be heard to object to the court's ruling.

V. It is insisted that the instructions given by the court covering the time for which plaintiff could recover were contradictory. We discover no ground for complaint in that respect. In one instruction the jury were told that, in any event, plaintiff could only recover for injuries occurring within two years next preceding the commencement of the suit; and, in another, that if they found that defendant sold no liquor to plaintiff's husband prior to May 12, 1891, she could only recover for damages, if any, caused by defendant since that time and prior to the beginning of her action. The instructions were consistent.

VI. The instructions of the court are much criticised. We have examined them with care, and think they fairly present the law applicable to the case; and those refused, in so far as they were correct, were covered by those in fact given. We can not consider specifically all of the objections made to the instructions, but we deem them without merit.

VII. It is urged that the court erred in refusing an instruction touching the contributing of defendant to the injuries sustained by plaintiff. It appears from the evidence that several saloon keepers, other than defendant, sold plaintiff's husband liquors. The instructions of the court upon this question were explicit and correct. Nor was it incumbent on the court to define the meaning of the word "contributed." It is safe to presume that the jury understood the common and accepted meaning of the word. To presume otherwise would be equivalent to holding that their ignorance was so dense as to unfit them for jury service.

VIII. Many of the objections to the introduction of evidence are obviated by the amendment filed during the trial. Error is assigned on the admission of evidence as to the number of children of plaintiff. It may be conceded that the admission of such evidence was wrong, but we think it was not prejudicial to defendant, in view of the express direction of the court to the jury as to what they could take into consideration in determining the defendant's liability.

IX. The verdict, one thousand dollars, is said to be excessive. We do not think so. It is true that several saloon men had been selling this man liquor, but it clearly appears that he had been by drink reduced from a prosperous and efficient business man to a sot; that as a result his property was exhausted, his business virtually ruined, that thus the means of support for his wife had been squandered; and that, as a further result of his condition, he abused his wife. To all this it clearly appears defendant contributed. That he is now reaping the reward of his persistent wrongdoing is the fault of no one but himself. We discover no error. **AFFIRMED.**

C. C. HERRON V. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

Delay in Delivering Message. Plaintiff, his wife and partner registered at the only hotel in a town of six hundred people on March 25, and began selling a patent fence near the main street. A dispatch for him was, on April 1, given to a messenger who was well acquainted in said town, for delivery. The messenger testified that he vainly inquired for plaintiff at the hotel, a restaurant, and one of the depots. He returned the message as being unable to find addressee, and the agent sent a service message for a fuller address. On the other hand, there was evidence that the landlord referred the messenger to the register, which the messenger examined under the current date, only, that he spoke of addressee to the restaurateur as "belonging to the fence gang," and that he was referred to the hotel, and that he deliv-

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ered a dispatch to plaintiff's partner that day, in plaintiff's presence. *Held*, that the question of negligence was for the jury, and that the sending of the service message did not absolve defendant. (1)

LIABILITY IN ABSENCE OF CONTRACTUAL RELATION. The owner of a telegraph line may be liable to an addressee for delay in the delivery of a message, though no contractual relation exist between them. Code, sections 1328, 1329. (2)

NOTICE OF IMPORTANCE OF MESSAGE. Where a dispatch contains an offer for addressee's horse and the receiving agent knows the horse and that the dispatch relates to trading for him and requires an answer, the company is charged with notice of the importance of the message. (3)

MEASURE OF DAMAGES. Where the sale of the horse, which had no regular market value in the neighborhood where kept, failed because of the delay, and he was sold later at the best price obtainable with reasonable effort, plaintiff may recover the difference between the price offered in the dispatch and that realized, with cost of keeping from offer to sale, and interest. (3)

REQUIREMENT TO PRESENT CLAIM WITHIN THIRTY DAYS: WHEN NOT OPERATIVE. A clause on the message blank that, claims for damage must be presented within thirty days does not govern, where plaintiff did not know, and could not reasonably ascertain within that time, what damage, if any, he had sustained by the failure of the sale offered him. (4)

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

WEDNESDAY, JANUARY 31, 1894.

ACTION to recover for damages alleged to have been caused by the negligence of defendant in not delivering in due time a telegraphic message. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.—*Affirmed*.

Cummins & Wright for appellant.

Casey & Stewart for appellee.

ROBINSON, J.—On the thirty-first day of March, 1890, the plaintiff was the owner of a stallion named

"Mark," which was in the custody of his brother, George Herron, at Warren, in Lee county. The plaintiff was in the town of Clarksville, in Butler county, where he was engaged with one Wintrode in selling a fence machine. On that date one George Cassidy went to the place where the horse was kept, and made an offer for him to a brother of plaintiff, named B. B. Herron, and requested that he telegraph the offer to the plaintiff. Accordingly B. B. Herron went to the office of the defendant in Warren, and left to be sent to plaintiff a night message which read as follows:

"WARREN, March 31, 1890.

"To C. C. Herron, Clarksville, Iowa:

Have traded with George Cassidy for Mark, three horses, 1, 2, 3, two hundred balance, fifty dollars young cattle.

B. B. HERRON."

There was evidence which tended to show that the offer of Cassidy was to be considered withdrawn on Wednesday, April 2, if not accepted on or before that day; that B. B. Herron had no authority to accept the offer or sell the horse; that he sent the dispatch as the agent of Cassidy; and that the agent of defendant at Warren knew that it related to a trade, and that an answer was expected the next day. The dispatch was received by the agent of defendant at Clarksville before 9 o'clock in the morning of April 1, and was at once given to a messenger to deliver. After an absence of several hours he returned it with the statement that he could not find the person to whom it was addressed. The agent then sent a service message to the office at Warren, stating that plaintiff was unknown in Clarksville, and asking for a better address. At noon of Wednesday he received an answer stating that plaintiff was a patent fence man, and would be found in town. At about the time that dispatch reached the agent at Clarksville, the plaintiff received a letter from B. B. Herron, telling of the trade, and asking why

the dispatch had not been answered. The plaintiff then went to the office, and sent a dispatch to his brother to do the best he could with Cassidy. While he was there, the dispatch of his brother was delivered to him. His dispatch was not delivered to his brother until Wednesday evening, and Cassidy was not seen until the next day, when he refused to take the horse. The plaintiff returned to Lee county in July, and took the horse to Nebraska, where he sold him for fifty dollars. He seeks to recover in this action the damages he claims to have sustained in consequence of the failure of defendant to deliver the message in time for him to accept the offer of Cassidy. The judgment was rendered for one hundred and seventy-seven dollars and sixty-five cents, the amount of the verdict, with interest and costs.

I. The appellant contends that the verdict was not authorized by the evidence, and insists that it exercised due diligence to deliver the message. We think there was sufficient evidence of negligence to support a verdict for the plaintiff. Clarksville is shown by the record to have been a town of about six hundred people in April, 1890. The plaintiff, with his wife and Wintrode, went to Clarksville on the twenty-fifth day of March, 1890, and stopped at the only hotel in the town, where he registered. A sample of the fence which the machine he was selling made was set up next to the principal business street, one block from the hotel, from which it could be seen. He and his companion were then engaged in exhibiting the fence to the public, and in trying to sell the machine, within the free delivery limits of the Clarksville office, during the last day of March and the first two days of April. Belden, the messenger of defendant, had lived in the town twenty-five years, was running a bus line, carried the mails and express, and was well acquainted with its people. There is some conflict in the evidence in regard to the effort he made to deliver the message. He claims to

have inquired of the landlord of the hotel where plaintiff stopped, at the restaurant, at one of the railway depots, and of a passenger on a train, without obtaining any information in regard to plaintiff. There is evidence, however, which tends to show that the landlord, in answer to his question, told him to look at the hotel register; that he did so, but looked only at the names under the latest date; that he had seen the plaintiff several times; that when he inquired at the restaurant he said plaintiff "belonged to the fence gang," and was told that he was at the hotel; and that he delivered a dispatch to Wintrobe on the first day of April, in the presence of plaintiff. It is evident that if the messenger had used ordinary diligence in his search he would have found the plaintiff, and his negligence is that of the defendant.

The sending of the service message did not relieve it of responsibility, for the reason that the address of the plaintiff as given in the dispatch to him was all that was necessary to enable the defendant to find him readily. It is said that B. B. Herron knew that the defendant had not found his brother, and could have given it the required information, so that his brother would have been found, and a message accepting Cassidy's offer received, in sufficient time to have effected the sale, but that he negligently withheld the information. If that be conceded to be true, it does not follow that his negligence was that of the plaintiff, for the reason that he appears to have been the agent of Cassidy for the purpose of sending the dispatch.

II. It is said that if the dispatch was sent by B. B. Herron as the agent of Cassidy, then, so far as it related to plaintiff, the act in sending it was purely voluntary, and conferred upon him no right of action on account of negligence in sending it. The Code provides as follows: "1328. Any person employed in transmitting messages by telegraph, must do so with-

out unreasonable delay, and anyone who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor." "1329. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law." The defendant violated the provisions of section 1328, in not transmitting the message to plaintiff without unreasonable delay, and thereby became liable, under section 1329, for all damages which resulted from that failure. There were no contractual relations between it and the plaintiff, and some authorities hold that, in such cases, the person injured can not recover; but the rule which seems to prevail most generally in this country is to allow the person to whom a dispatch is sent, even though sent by a person under no obligation to send it, to recover of the telegraph company damages caused by delay in the transmission. *Telegraph Co. v. Du Bois*, 21 N. E. Rep. (Ill. Sup.), 5; 3 Suth. Dam. 314; 2 Shear. and R. Neg. section 543; Whart. Neg. section 757; Gray, Com. Tel. section 65; *Wadsworth v. Telegraph Co.* 86 Tenn. 711, 8 S. W. Rep. 574; *Telegraph Co. v. Adams*, 12 S. W. Rep. (Tex. Sup.) 875. There can be no doubt, under these authorities and the sections of the Code quoted, that the right of plaintiff to recover does not depend upon a contract made by or for him.

III. The court charged the jury that, if plaintiff was entitled to recover, the measure of damages would be the difference between the price he would have received from Cassidy and the price he afterward obtained for the horse, and the reasonable value of the care and keeping of the horse, with six per cent. interest from the time the horse was sold. The appellant

contends that the measure of damage given by the charge was erroneous. The blank on which the message sent was written stated that errors and delays might be prevented by repetition, for which an extra price would be charged, but that defendant would receive night messages, to be sent without repetition, at a reduced rate, "and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the amount paid for transmission." We do not understand the appellant to claim that the appellant is bound by the provisions quoted, but it contends that it had no knowledge of the transaction out of which the message grew; that the message did not disclose the interests which were dependent upon it; and that defendant should not be charged with any liability which it can not be reasonably said would be an ordinary and natural result of a failure to transmit the message within a reasonable time, and therefore contemplated by the parties when the defendant undertook to send the message. The evidence shows that the agent of defendant at Warren knew of the horse when the message was given him to send, that it related to a pending trade, and that an answer was expected. Knowledge of these facts was sufficient to authorize the jury to find that defendant should be charged with knowledge of the importance of the message when it was received. *Garrett v. Telegraph Co.*, 83 Iowa, 262, 49 N. W. Rep. 88.

It is claimed that, if defendant is liable to plaintiff for all the damages he sustained by reason of the delay in transmitting the message, the measure of that damage is the difference between the market value of the horse and the price which Cassidy would have paid for him, had his offer been accepted. That would probably have been true, had there been a market value for the

horse, but the evidence shows that there was not. He was an inferior animal, and valuable only for breeding purposes. There was no market for that kind of horses in Lee county and vicinity. George Herron, who had charge of the one in question, made diligent effort to sell him after the thirty-first day of March until he was taken to Nebraska, but without success. The plaintiff also personally made every effort possible to effect a sale, and finally took the horse to Nebraska, and traded him for land, receiving for him fifty dollars in value. It is not true, as a general rule of law, that in such cases as this, the plaintiff would be entitled to recover the difference between the price he would have received, had he been able to accept the offer, and the price he actually received; but it appears that the plaintiff in fact sold the horse for all which could have been realized for him with reasonable effort to secure the best price attainable. The value of the property Cassidy offered for the horse was two hundred and fifty dollars; hence plaintiff sold him for two hundred dollars less than the amount of Cassidy's offer. It was necessary for plaintiff to pay the expense of keeping the horse from the second day of April until he was sold, and the evidence sustains the allowance, if any, made by the jury for that purpose. The loss in price, the expense of keeping the horse, and interest, represented actual damages which the plaintiff sustained by not accepting the offer of Cassidy; and it is the policy of the law to permit a person injured by the wrong of another to recover the amount of his loss. Where the loss results from a failure to sell property for which there is no market value, its actual value may be ascertained by means of the best evidence of which the case admits. 3 Suth. Dam. section 476; 1 Sedg. Dam. section 250; Wood, Wayne, Dam. section 22; *White v. Cattle Co.*, 12 S. W. Rep. (Tex. Sup.) 867. We conclude that the measure of damages adopted by the court, as applied to the

facts in this case, was not erroneous. The jury were authorized to find that Cassidy would have taken the horse according to his offer had it been accepted, and the verdict is sustained by the evidence.

IV. The blank on which the message was written by B. B. Herron contained the following provision: "No claim for damages shall be valid, unless presented in writing within thirty days after sending the message." The court charged the jury as follows: "If you find from the evidence that the sender of the message was the agent of and acting for the plaintiff in transmitting the message, then it would be binding upon him, unless the plaintiff has shown by evidence that the claim he makes for damages against defendant had not matured, if so, and could not reasonably have been ascertained within thirty days after the message had been sent, if such was the case." We think that portion of the charge is substantially correct, as applied to the facts in this case. The evidence authorized the jury to find that the plaintiff did not know, and could not with reasonable diligence have ascertained within thirty days of the sending of the message, what amount of damage, if any, he had sustained in consequence of defendant's negligence. The blank required that claims for damages, not notice of claim, to be valid, must be presented within the time stated. A limitation in the agreement for sending the message, which, in its practical effect, would deprive the sender of the message of all redress for injury caused by the wrong of the defendant, would be unreasonable, and to that extent, at least, must be deemed inoperative.

V. The conclusions announced dispose of all material questions presented for our determination. We find no sufficient ground for disturbing the judgment of the district court, and it is, therefore, **AFFIRMED**.

J. D. AND D. H. POTTER, Appellants, v. C. H.
YOUNG *et. al.*

Action by Indorsee: Fraud as a Defense: EVIDENCE TO SUSTAIN VERDICT. Where the only defense to a note is, that the indorser, indorsee and payee conspired to obtain it of the maker by fraud, a verdict for defendants is improper in the absence of proof that either of said persons participated in the alleged fraud.

Appeal from Madison District Court.—HON. A. W.
WILKINSON, Judge.

WEDNESDAY, JANUARY 31, 1894.

THIS action is to recover upon a promissory note executed February 24, 1890, by the defendants, C. H. Young, Thomas C. Young, and R. A. Creger, for three hundred dollars, payable to the order of the Mutual Trust & Loan Company six months after date. Plaintiffs allege that said note was indorsed by said company to W. P. Potter, and by W. P. Potter to plaintiffs, for value before maturity, and that the same is still the property of plaintiffs and unpaid. The defendant C. H. Young, for himself and his codefendants, answered, admitting the execution of said note, and that, but for the defenses set up, there would be due the plaintiffs the full amount thereof, less credits thereon. Defendant denies every other allegation, and expressly denies that plaintiffs or said W. P. Potter were innocent purchasers of said note for value before due. It is alleged as defense that prior to August 24, 1889, said company was composed of said Potters and others, who fraudulently induced defendants and others to execute and deliver to said company a promissory note without consideration, dated August 24, 1889, for three hundred dollars, signed by J. B. W. Westfall, C. H. Young and C. A. Westfall. That, prior thereto, J. B. W. Westfall

was secretary and business manager of said company. That said company and the members thereof, including said Potters, for the purpose of cheating and defrauding C. H. Young by obtaining his signature to said note without consideration, sent said Westfall to him to make false and fraudulent representations to him in relation to the financial condition of said company and of said Westfall. That, with the consent of said company and the members thereof, including said Potters, and by their direction and authority, said Westfall falsely and fraudulently represented to defendant, as an inducement to sign said note, that he (Westfall) was worth ten thousand dollars; that he was the principal stockholder in, and the business manager of, said company; that said note was to be used for a short time as collateral, and would be soon taken up and canceled, and that defendant would never have anything to pay on said note—all of which was false, and known to the company and its members to be false. That, relying on said representations, defendant signed said note without any consideration therefor. That, without his knowledge or consent, but with the knowledge and consent and direction of said company and its members, including said Potters, said note was altered and changed, after it was signed by defendant, by securing the signature of C. A. Westfall thereto. That the note in suit was executed and delivered in renewal of said former note, and is without consideration and void. That, knowing that said first note was obtained by fraud, was without consideration, and altered as aforesaid, said company, by its secretary and business manager, B. W. Brockway, with the knowledge, consent and authority, and by the direction, of the said Potters, induced the defendant to execute the note in suit in renewal of said other note. That said Brockway, secretary of the company and agent of the Potters, with their knowledge and authority, and by their direction,

made numerous false and fraudulent representations as an inducement to get defendant to execute the note in suit, and agreed that, if defendant would do so, said company would execute and deliver to him shares of its stock to the amount of three hundred dollars, which it has refused to do. That said Brockway represented that said stock was worth par, when in fact it was worthless; and that defendant would not have the note to pay until he realized on the stock to pay it. That, at the time he executed the note in suit, he did not know of the said frauds and alteration as to the said first note. The case was tried to a jury, and a verdict for the defendants, with twenty-nine special findings, returned. Judgment was entered on the verdict. Plaintiffs appeal.—*Reversed.*

John Leonard & Son for appellants.

A. R. Darbey and G. W. Seevers for appellees.

GIVEN, J.—Defendants having admitted liability on the note but for the matters set up as a defense, the burden of proof was upon them. At the close of their evidence plaintiffs moved for a verdict on the grounds that there was no evidence showing, or tending to show, that the payee or either of the indorsees of the note in suit were guilty or cognizant of fraud in the transaction, as alleged by defendants, and that there was no evidence that J. B. W. Westfall was the agent of plaintiffs. This motion was overruled, and of this ruling plaintiffs first complain. It will be observed that defendants not only alleged fraud in the inception of both notes, but also that it was with the consent, and by the direction and authority of the payee and said indorsees, that the alleged frauds were committed. The motion is not based upon the ground that there was no evidence of fraud in the inception of the notes, but upon the ground that there was no evidence that the

payee or said indorsees were guilty of, or participated therein, or that J. B. W. Westfall was agent for plaintiffs. One ground of plaintiff's motion for a new trial was that the verdict and special findings are not supported by, and are contrary to, the evidence and instructions, and were rendered under the influence of passion and prejudice. The overruling of this motion is also assigned as error. As these two assignments involve an examination of the evidence, we consider them together. It will be observed that the defense is not the usual defense of fraud or illegality in the inception of the note, and that plaintiffs purchased after maturity, or with notice of the fraud or illegality. The defense in this case is that the plaintiffs, W. P. Potter, their indorser, and the Mutual Loan & Trust Company, payee, conspired to, and authorized and directed, the commission of the frauds alleged. The case is not different, as to the burden of proof under this defense, than it would be if the action was by the payee, and fraud or illegality was pleaded as a defense. The rule announced in *Bank v. Nelson*, 41 Iowa, 565, does not apply to this defense. This is not a question whether the plaintiffs are bound by the fraud of another in the inception of the note, but whether they were parties to that fraud. In the view we take of the case, it would not be proper to discuss the evidence at length. It is sufficient to say that there is no evidence upon which to claim that either of the plaintiffs or W. P. Potter were parties to, or cognizant of, the alleged frauds, except that they were shareholders in the Mutual Loan & Trust Company, and at times purchased securities from the company. There is no evidence tending to show that said company, or any of its members, other than J. B. W. Westfall and B. W. Brockway, participated in, or knew of, said alleged frauds, except that Westfall was secretary and manager of the company when he procured the first note,

and Brockway was secretary when he procured the note in suit. The first was Westfall's note to the company, and was signed by defendant C. H. Young, as surety for Westfall, who was acting for himself, and not for the company, in giving his note to the company. Brockway took the second note in renewal of the first, without any knowledge, so far as appears, of the alleged frauds of Westfall. A delivery of the first note to Westfall by defendant C. H. Young, after he had signed it, was not a delivery to the company, but to Westfall of his own note. There was no evidence that C. A. Westfall signed it after delivery to the payee. Plaintiffs' motion for a verdict being overruled, they called every member of said company, except one, who was absent, and J. B. W. Westfall, who had left the country. Each of said witnesses, including the plaintiffs and W. P. Potter, denied any knowledge whatever of the alleged frauds, and B. W. Brockway denied having made the representations and promises as charged to have been made by him in taking the note in suit.

From this summary of the evidence it will be seen that defendants not only failed to show that plaintiffs, or W. P. Potter, or the company, participated in the alleged frauds, but that the plaintiffs showed by uncontradicted evidence that they neither authorized nor knew of said frauds. We are unable to discover, from the record, any reason for this verdict, unless it is that the passions and prejudices of the jury against the Loan and Trust Company and plaintiffs were successfully appealed to by the same line of argument that the defendants' counsel addressed to this court. We are told that the Loan & Trust Company, "by implication, officially authorized and directed him (Westfall) to invade the country, and to make false and fraudulent representations to the footsore and unsuspecting grangers, and prey upon the innocent, and procure their signatures to promissory notes, without any considera-

tion, payable directly to the company, while they impatiently, though silently, lurked in the background, with ill concealed anxiety for the results of the fraudulent work of their authorized agent, and only too anxious and willing to satisfy their hunger and thirst for fresh meat and blood by feasting on the innocent lambs which he was authorized and expected to bring to the shambles." We discover no warrant for such an implication, nor for that and similar arguments presented in the case. But few of the answers to special finding have any support in the evidence, and the general verdict is contrary to the evidence and instructions. The district court might very properly have sustained plaintiff's motion for a verdict, and surely should have granted a new trial. REVERSED.

R. H. FAIRBAIRN v. F. M. HAISLET, Appellant.

90	143
97	508
98	651

Defect in Pleading not to be Raised on Evidence. Where an issue is made and tried without objection, evidence tending to prove it can not be excluded. (1)

Review of Question of Fact: INCOMPLETE ABSTRACT. Where an undenied, amended abstract states that the evidence is not all before this court, it will not determine whether a fact found below is proven. (2)

Appeal from Chickasaw District Court.—HON. W. A. HOYT, Judge.

WEDNESDAY, JANUARY 31, 1894.

THE plaintiff is the editor of the New Hampton *Courier*, and the defendant, of the New Hampton *Tribune*,—newspapers published in Chickasaw county, Iowa. These two, with four other papers, were applicants for the county printing at the January session of

the board of supervisors, 1892. The proceedings of the board were such that it awarded the printing to four of the papers, among which was the defendant's paper,—the *New Hampton Tribune*. The plaintiff's paper, the *New Hampton Courier*, was excluded from the list, and he appealed to the district court. In the district court, Fairbairn filed what is denominated in the abstract as "Pleadings of Appellant." The pleading commences as follows: "The appellant, R. H. Fairbairn, publisher of the *New Hampton Courier*, shows the court that many of the facts necessary to be known in order to properly understand and decide this case do not appear in the record of the board of supervisors, and he files this pleading to make said facts a part of the record. Said facts are as follows, to wit." The facts recited are with reference to the proceedings of the board, the appearance before it of the claimants, the facts as to lists presented, and the conclusions of the board in awarding the printing. It is not important to set out the pleading. To this pleading the defendant filed his answer as follows: "Comes F. M. Haislet, defendant, and for answer herein denies each and every allegation in plaintiff's pleading contained. Denies that there was any action taken by the board, from which an appeal could be taken." Upon the issue thus formed, evidence was taken on the part of the plaintiff, at the close of which defendant filed a motion to "dismiss the appeal and enter judgment for defendant on the following grounds, to wit." The grounds are ten in number, each of which is based on what "the evidence fails to show," or what the "undisputed evidence shows." The district court overruled the motion, and it then appears from the abstract that "defendant, F. M. Haislet, stands on his said motion, and refuses to plead further." The court gave judgment for the plaintiff, making his paper one of the official papers of the county, and from the order the defendant, Haislet, appeals.—*Affirmed*.

J. W. Sandusky and T. C. Clary for appellant.

No argument for appellee.

GRANGER, C. J.—I. H. Shaver was attorney for the plaintiff in the proceeding before the board at its January session, 1892, when the order designating the papers was made. At the trial of the issue in the district court, he was called as a witness by plaintiff, and interrogated as to the proceeding before the board by questions tending to show whether or not there was a contest before the board from which an appeal could be taken. The evidence was admitted under objection, and it is now urged that the court erred in admitting it. The evidence tended to prove the allegations or statements of the pleading filed by plaintiff, on which defendant took issue by his answer. It is not for us to question the sufficiency of the issue formed. It was made by the parties without objection, and was for trial. The evidence was pertinent and material to the issue joined. The pleading filed plainly indicated the line of inquiry to follow, and, if it was improper, defendant should have declined such an issue, by attacking the pleading as insufficient or improper. The part of the pleading we have quoted shows a purpose to prove facts not of record in the proceedings of the board, and the further averments specify the particular facts. Any legal objection was plainly apparent on the face of the pleading.

II. Upon the trial the district court must have found that there was a contest from which an appeal could be taken. It is insisted to us that the evidence fails to show such a contest, and, further, that it shows, without dispute, that there was no such contest. These questions we can not determine, under the condition of the record. They involve an examination of the evidence. Appellee files an additional abstract, in which some additional evidence is referred to, and it is stated

that the bill of exceptions contains all the evidence, and that appellant's abstract "only sets out a very small part of the bill." It is then stated that the abstract and the amended abstract contain only a small part of the bill of exceptions and evidence. The statements in the amended abstract are to be taken as true. *Marsh v. Smith*, 73 Iowa, 295, 34 N. W. Rep. 866; *Acton v. Coffman*, 74 Iowa, 17, 36 N. W. Rep. 774; *Foley v. Hefferon*, 70 Iowa, 572, 31 N. W. Rep. 877. Appellant has filed no denial of appellee's abstract, and this case is clearly within the rule of those cited. Without the evidence all before us, we can not determine what it proves or disproves, which are the only remaining questions presented. See *Shattuck v. Insurance Co.*, 78 Iowa, 377, 43 N. W. Rep. 228; *Neitz v. Hilker*, 51 N. W. Rep. 23. The judgment below is AFFIRMED.

C. F. FURLEY AND S. A. STEIN V. THE CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant.

Transporting Infected Cattle into Iowa: LIABILITY NOT ABSOLUTE. Bringing a cow which is transferred to a common carrier from a connecting line, into the state, which cow is one originally shipped from Iowa into the south and reshipped to Iowa, and which has Texas fever when brought back here, does not make the common carrier absolutely liable for damages to those injured by the importation, under Code, section 4058, as amended by Acts, Twenty-first General Assembly, chapter 156, and such injury makes a *prima facie* case of liability, only, which may be rebutted by showing that the railway company was free from negligence. ROBINSON, J., *dissenting*; KINNE, J., taking no part.

Appeal from Tama District Court.—HON. L. G. KINNE,
Judge.

WEDNESDAY, JANUARY 31, 1894.

ACTION to recover damages for the loss of certain cattle which, it is alleged, died from the disease called "Texas fever," which disease was contracted by con-

tact with a cow which the defendant unlawfully transported into this state from the state of Illinois. There was a trial by jury, and a verdict and judgment for the plaintiffs. Defendant appeals.—*Reversed.*

Mills & Keeler for appellant.

Struble & Stiger for appellees.

ROTHROCK, J.—It appears from the record that on June 22, 1890, one Nathan L. Brown shipped from Long Beach, on the Gulf of Mexico, six miles east of Pass Christian, in the state of Mississippi, a car load of emigrant movables, consisting of household goods, a horse, and a cow, to a station on defendant's road at Elberon, Tama county, in this state. Brown accompanied the car, and remained in charge of its contents, throughout the journey. The car was billed through from the starting point to its destination, and it was transported over connecting lines until it reached Port Byron Junction, in the state of Illinois, where it was delivered to the defendant, to be forwarded over defendant's road to its destination. When the car arrived at Elberon, which was about June 27, 1890, Brown unloaded and took away his property. He turned the cow into a pasture with plaintiffs' cattle, and it is claimed by the plaintiffs that their cattle contracted the disease known as "Texas fever" from said cow, and that by reason thereof about thirty-two of plaintiffs' cattle died. The defendant filed an answer in two counts. The plaintiffs demurred to the second count of the answer. The court sustained the demurrer. The trial proceeded upon the petition and the first count in the answer. The main contention on the trial, after the demurrer was sustained, appears to have been on the question whether the plaintiffs' cattle died from Texas fever by contagion from the said cow owned by Brown, or from some other disease.

It is conceded by counsel for the respective parties that the principal question on this appeal is whether the demurrer to the second count of the answer was rightly sustained. We will, therefore, proceed to a consideration of that question. The defendant, in the second count of the answer, admits that it received the car at Port Byron Junction in the state of Illinois, with a waybill of said car and contents, and that said cow and other property were shipped from Long Beach, near Pass Christian, Mississippi. The defensive part of the answer is as follows: "And defendant further avers that at no time while said car and stock were so in its possession or under its control, whether in transit or otherwise, did it have any knowledge or information whatever, of any nature or degree, that said cow was in such condition as to infect with or to communicate Texas fever to other cattle, or to plaintiffs' cattle; that, if such cow was then in that condition, such fact was utterly unknown to this defendant, and could not have been discovered by it with the means then at its command, or in the exercise of such care on its part as was required by law, under the circumstances; that this defendant exercised all due care and caution on its part, and had neither knowledge nor means of knowledge that said cow, when so brought within the state of Iowa, or when delivered at Elberon, was diseased, or was in such condition as to infect with or to communicate to other cattle Texas fever, as alleged in plaintiffs' petition, and it was not negligent in that respect." There were several paragraphs in the demurrer, separately numbered; but there was really only one ground upon which it was claimed that the answer was vulnerable to the demurrer. It is clearly stated in the seventh paragraph, which is as follows: "The statute of Iowa expressly prohibited any person from bringing into this state cattle in such a condition as to infect with or to communicate Texas

fever to other cattle. Defendant, in the said second count of its answer, admits, by implication, the violation of this statute, but pleads, as a defense and excuse, that it acted in ignorance and without information as to the condition of the animal in question; and the admission of the defendant that it violated the law of this state is not excused by an allegation of want of knowledge or information, nor that it acted in violation of law in ignorance of its provisions, and exercised care in the premises." It will be observed that the demurrer is as broad as the answer, and the question presented is, is the defendant absolutely liable to the plaintiffs, notwithstanding the fact that its agents and employees had no knowledge or information of the condition of the cow, and that the said condition could not have been discovered by the exercise of proper care and caution, and that the defendant was not negligent in receiving the car, and transporting its contents to their destination. The ruling on the demurrer precluded the defendant from showing that it exercised all proper care and caution, and was not chargeable with negligence; and the charge to the jury was to the effect that if the cow was, at the time of shipment, in such condition as to infect with or communicate Texas fever to other cattle, and did communicate the disease to plaintiffs' cattle, from which disease they, or some of them, died, the defendant was absolutely liable for damages.

The question is to be determined by the construction placed on chapter 156 of the Acts of the Twenty-first General Assembly, which is amendatory to, or rather substituted for, sections 4058 and 4059 of the Code. The second section of the act, which is designated as section 4058, prohibits any person or corporation from importing any cattle into this state which, at the time of such importation, are in such condition as to infect with or communicate to other cattle pleuro-

pneumonia, or splenic or Texas fever. It makes the violation of the law a misdemeanor, and visits the offender with a fine of not less than three hundred dollars and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months, in the discretion of the court. The third section of the act is as follows: "Any person who shall be injured or damaged by any of the acts of the persons named in section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employees or corporation mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding nor said civil action shall in any stage of the same be a bar to a conviction or to a recovery in the other. This statutory provision does not appear to us to be essentially different, so far as the rule of liability thereunder is involved, from that part of section of 1289 of the Code which was under consideration by this court in the case of *Small v. Railway Co.*, 50 Iowa, 338. That provision is as follows: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages." It was held in the case above cited, that this does not create an absolute liability, but makes the fact of an injury so occurring only *prima facie* evidence of negligence, which may be rebutted by a showing of freedom from negligence. It is true that the decision in that case was made by a divided court; but the rule of the majority has since been followed in very many cases. See *Slosson v. Railway Co.*, 51 Iowa, 294, 1 N. W. Rep. 543; *Libby v. Railway Co.*, 52 Iowa, 92, 2 N. W. Rep.

982; *Babcock v. Railway Co.*, 62 Iowa, 593, 13 N. W. Rep. 740 and 17 N. W. Rep. 909; *Rose v. Railway Co.*, 72 Iowa, 625, 34 N. W. Rep. 450; *Seska v. Railway Co.*, 77 Iowa, 137, 41 N. W. 596; *Engle v. Railway Co.*, 77 Iowa, 661, 37 N. W. Rep. 6, and 42 N. W. 512; *Greenfield v. Railway Co.*, 83 Iowa, 270, 49 N. W. Rep. 95. And since the decision was made in *Small's case* there have been six regular sessions of the general assembly, and we are not aware that at any time there has been any proposition introduced looking to an amendment of this statute, so as to make the liability for setting out fires absolute. Under such circumstances, it would be an amazing departure from a long line of decisions to hold that the construction adopted in *Small's case* is not the settled law of this state, as expressed by this court, and as enacted by the lawmaking power. As we have said, the statute declaring liability for setting out fires, so far as the question of its absoluteness is involved, is not different from the statute applicable to this case. We need not here set them out side by side. They are essentially the same, as will appear by any fair examination of their provisions. It is provided by a statute of the state of Kansas as follows: "That no person or persons shall drive or cause to be driven into or through any county in this state, any cattle diseased with the disease known as Texas, splenic, or Spanish fever. Any person violating any provision of this act shall on conviction be adjudged guilty of a misdemeanor, and shall be fined not less than one hundred and not more than one thousand dollars, and be imprisoned in the county jail not less than thirty days and not more than one year." Another section of the same act is as follows: "Any person or persons who shall drive or cause to be driven into or through any county in this state any of the cattle mentioned in section one of this act, in violation of this act, shall be liable to the party injured for all

damages that may arise from the communication of disease from the cattle so driven to be recovered in civil action, and the party so injured shall have a lien upon the cattle so driven." In the case of *Patee v. Adams*, 37 Kan. 133, 14 Pac. Rep. 505, it was held that in an action to recover damages under this statute it was essential for the plaintiff to allege and prove that the defendant knew, or had reason to know, that the cattle so driven were diseased with the fever, or were liable to communicate the disease to the domestic cattle of the state. It will be observed that the statute involved in that case is not essentially different from our own. They both declare a liability in general terms, without any language importing an absolute liability. The cited case goes much further than *Small's case*, or than we do in the case at bar, and holds that the burden of proof of knowledge or negligence is on the plaintiff. *Patee v. Adams*, *supra*, was followed and approved in *Railway Co. v. Finley*, 38 Kan. 350, 16 Pac. Rep. 951. Counsel for appellee admit that the cited cases involve the same question which we are considering. It is to be conceded that a contrary rule has been adopted in the state of Missouri. See *Wilson v. Railway Co.*, 60 Mo. 184, and *Surface v. Railway Co.*, 63 Mo. 452. In our opinion, the rule of the Kansas cases is in line with the better principle.

But it is claimed by counsel for appellee that the question has, in effect, been determined by this court; and we are cited to the cases of *Jamison v. Burton*, 43 Iowa, 282; *Dudley v. Sautbine*, 40 Iowa, 650; *State v. Thompson*, 74 Iowa, 119, 37 N. W. Rep. 104; and *State v. Cloughly*, 73 Iowa, 626, 35 N. W. Rep. 652. These and other cases which have been decided by this court are mainly prosecutions for violations of the prohibitory liquor law of this state by selling beer to minors and inebriates, and it is held that want of knowledge of the age or habits of the purchaser is no

defense. The principle upon which the cases rest is that the avocation of the vendor of intoxicating liquors is unlawful, except under certain circumstances, and that, when he sells, he assumes the burden of knowing that these circumstances exist, and sells his liquor at his peril. It is a general rule that mere ignorance of fact will not excuse a person from a penalty provided by statute. 3 Greenleaf on Evidence, section 21. But that principle can have no application to one who, in the pursuit of a lawful calling, and in the exercise of proper care and caution, does an act contrary to some statutory requirement. The theory of appellee is that defendant committed a criminal act, the violation of which is punishable by fine and imprisonment, and that, as it could make no successful defense to a criminal prosecution, it is absolutely liable for the damages occasioned by the criminal act. This is not an absolute rule. The law is well settled that, when a railroad train is operated through a city at a rate of speed prohibited by law or ordinance under a penalty, there is no absolute liability to a person injured by reason of the violation of the law or ordinance. It may, in such case, be shown that the person injured contributed to cause the injury by his own negligence. The application of the principle contended for to the facts of this case, it appears to us, shows conclusively that the defendant should have the right to prove, if it can, that it was free from negligence in receiving and transporting the car over its road. There is no hardship to plaintiffs in adopting this rule. The case is exceptional in its facts. It was not an ordinary shipment of live stock, which would put the employers on inquiry as to whether the animals were such as come within the provisions of the statute. The cow was not bred in the south. The owner of the property was a resident of this state. In the fall of the year previous to the shipment complained of, Brown went to Long

Beach to remain during the winter. He shipped his cow, with certain household goods, to that place, and the alleged cause of action arose when he reshipped the property to this state in the spring following. There was nothing in the appearance of the cow indicating that she had any disease. The fact appears to be that she was not diseased. She was milked during all the time she was in the south, and after she was returned to this state, and the milk was used by Brown's family. In the autumn of the following year she was fattened and slaughtered, and her flesh was used for food. There is evidence, however, to the effect that an animal acclimated in the south, and removed to this state, may communicate the Texas fever to cattle here without showing any evidence of the disease itself. In view of this claim, and in consideration of the fact that the defendant, as a common carrier, is bound to receive and transport freight offered for shipment, it would be unjust and unreasonable to require that it be absolutely liable to pay all damages arising by reason of the carrying of animals that may communicate contagious diseases, without allowing it to be shown that the carrier had no notice, and could not, by the use of reasonable care, have ascertained, that the animal belonged to the class, the transportation of which is forbidden by the statute. We think the statute under consideration does not impose any such absolute liability. The business of a common carrier is not only lawful, but it is absolutely essential as an agency in the transaction of the business interests and commercial affairs of the country. Under the facts of this case, the claim of appellee, in the face of the facts pleaded in the answer, is that the defendant was bound at its peril, before receiving the car, to ascertain that the animal was not in such condition as to communicate the disease to other cattle. Under the law of this state and the act of congress known as the "Interstate

Commerce Law," the defendant was bound to receive freight in car lots, and haul it to its destination. McClain's Code, section 2039; U. S. Stat. 1885-87, page 379. And the nature of the freight in this case was such that the defendant was bound to act promptly. It was liable to an action for damages, if it failed to so act. The contention of plaintiff is that there is a liability to fine and imprisonment and damages for receiving and hauling the car. Suppose that the defendant was a natural person, and should be indicted, and he should offer to prove the facts set up in this answer; we think there ought to be no question that it would be a great error to reject the evidence, and hold the defendant guilty of a crime, and imprison him in a county jail for six months, and fine him one thousand dollars. There is nothing in either the letter or the spirit of the statute which would sanction any such proceeding. The case is essentially different from those arising upon such police regulations as are enacted for the purpose of regulating dramshops, gambling houses, and the smuggling of goods, and the like. Counsel for appellee, in their argument in this court, say that, if the construction of the statute which we have adopted is to prevail, "it will at once become a dead letter, and may as well be repealed." We think the fears of counsel are groundless. As we have said, the case at bar is exceptional in its facts. We hold that the defendant should be allowed to show that it was blameless, if it can make such a showing. The rule in the *Small case* left that statute in full force, and recovery has been had under that law in a large number of cases, as the reports of the decisions of this court will show. The judgment of the district court is REVERSED.

KINNE, J., took no part in the decision of this case.

ROBINSON, J. (*dissenting*).—I do not agree to what is said in the foregoing opinion in regard to the

effect of chapter 156 of the Acts of the Twenty-First General Assembly. Section 4058 of the Code, as amended by that act, provides as follows: “* * * Any railway company * * * who shall carry, ship or deliver any cattle into this state * * * which, at the time they were * * * brought, shipped or transported into this state were in such condition as to infect with or to communicate to other cattle, pleuro-pneumonia, or splenetic or Texas fever, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than three hundred dollars, and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months. * * *” In my opinion, the offense for which that section provides is one of the class referred to in 3 Greenleaf on Evidence, section 21, in the following language: “Where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, when the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril.” In *Commonwealth v. Raymond*, 97 Mass. 568, it is said to be the general rule, where acts which are not evil in themselves are prohibited by law from motives of public policy, and not because of their moral turpitude

or the criminal intent with which they are committed, that persons are bound to know the facts and obey the law at their peril. That doctrine I understand to be fully sustained by the authorities. Thus, in 1 Wharton on Criminal Law, section 88, it is said: "When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact, no matter how sincere, is no defense. * * * The function of imposing indictability on pernicious acts, irrespective of intent, is one which has been exercised by legislatures, not only frequently, but from necessity. * * * The question is one of policy; and this may be taken into consideration when the legislative meaning is sought. That a man should be convicted of a malicious act without proof of malice, or of a negligent act without proof of negligence, is of course an enormity which no legislature could be supposed to direct. But it is otherwise as to certain mischievous acts, which it may be a sound policy to prohibit arbitrarily, because they imperil public safety (as, for example, the selling of intoxicating drinks, and defective storing of explosive compounds), and because to require scienter to be proved would be to defeat the object of the statutes, since in many cases, and those the most dangerous of the class, it would be out of the power of the prosecution to prove *scienter* beyond reasonable doubt. * * *"

The doctrine of the statements quoted is illustrated by the citation of numerous cases where persons were adjudged guilty of crimes by innocently doing acts which they believed, and had good reason to believe, were lawful; and the conclusion of the author is that honest ignorance of a fact may be no more of a defense than honest ignorance of a law, and that honest belief that an illegal act is legal is not necessarily a defense in a criminal prosecution. See, also, *State v. Hartfiel*, 24 Wis. 60; 4 Am. and Eng. Encyclopedia of Law, 689. The doctrine of the authorities cited was approved in

the recent case of *Commonwealth v. Weiss*, 139 Pa. St. 247, 21 Atl. Rep. 10. A legislative enactment of that state, known as the "Oleomargarine Act," provided that "no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitations or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food." The act also provided that every person who should manufacture, sell, or offer or expose for sale, or have in his possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the provision quoted, should for every such offense forfeit and pay the sum of one hundred dollars. The action named was commenced against the keeper of a restaurant to recover the statutory penalty for a violation of the law. It appeared that he had served a customer with oleomargarine, contrary to the provisions of the act specified, but that he did not knowingly furnish, or authorize to be furnished, to any of his customers, any oleomargarine, but so far as he knew, furnished genuine butter. In considering his guilt, the court said: "Whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense is a matter of construction.

"It is for the legislature to determine whether the public injury threatened in any particular matter is such, and so great, as to justify an absolute and indiscriminate prohibition, even if, in the honest prosecution of any particular trade or business, conducted for the manufacture of articles of food, the product is healthful and nutritious; yet, if the opportunities for fraud and adulteration are such as to threaten the pub-

lic health, it is undoubtedly in the power of the legislature either to punish those who knowingly traffic in the fraudulent article, or, by a sweeping provision to that effect, to prohibit the manufacture and sale altogether. The question for us to decide, therefore, is whether or not, from the language of the statute, and in view of the manifest purpose and design of the same, the legislature intended that the legality or illegality of the sale should depend upon the ignorance or knowledge of the party charged. The statute in question was the exercise of the police power, and the act was sustained upon this ground, not only in this court, but also in the supreme court of the United States.

* * * The prohibition is absolute and general; it could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act shall be done knowingly or willfully, and, if it did, the design and purpose of the act would be practically defeated. The intention of the legislature is plain—that persons engaged in the traffic shall engage in it at their peril, and that they can not set up their ignorance of the nature and qualities of the commodities they sell as a defense.”

The rule of the authorities cited has been frequently recognized by this court. In *State v. Probasco*, 62 Iowa, 401, 17 N. W. Rep. 607, it was held that if a minor was permitted to remain in a billiard saloon, in violation of the statute, the offense prescribed by the statute was committed, even though the keeper of the saloon did not know of the presence of the minor. See, also, *State v. Thompson*, 74 Iowa, 122, 37 N. W. Rep. 104. The same rule has been applied in cases involving acts wrong in themselves. Thus, in *State v. Newton*, 44 Iowa, 45, it was held that a person who made an assault on a female under the age of ten years for a purpose forbidden by section 3861 of the Code was guilty of

a violation of section 3873, even though he did not know that the child was under that age. It was said that the crime did not depend upon the knowledge of defendant of the fact that the child was under ten years of age, but upon the fact itself. The case of *State v. Ruhl*, 8 Iowa, 449, announces a similar doctrine, and it is supported by numerous decisions in civil cases. In *Dudley v. Sautbine*, 49 Iowa, 650, it was held that, where the agent of the owner of a saloon sold intoxicating liquor to a person who was in the habit of becoming intoxicated in violation of law, his principal was liable, although the liquor was sold without his knowledge, and in violation of instructions he had given. See, also, *Church v. Higham*, 44 Iowa, 482. Where a person had the right to sell intoxicating liquor to some persons, but was prohibited from selling to a minor, he was guilty of a violation of the law in selling to a minor although he did not know that the purchaser had not attained his majority, and had good reason to suppose that he had. *Jamison v. Burton*, 43 Iowa, 282. If a person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape his control, between the first day of September in any year and the first day of May following, he is absolutely liable for damages which result, and his liability is not affected by the degree of diligence he used to prevent the escape of the fire. *Conn v. May*, 36 Iowa, 241; *Thoburn v. Campbell*, 80 Iowa, 340, 45 N. W. Rep. 769.

Section 4059 of the Code, as amended by chapter 156 of the Acts of the Twenty-first General Assembly, provides that "any person who shall be injured or damaged by any of the acts of the persons named in section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employees or corporations mentioned therein, and recover the actual damages sustained by the person or persons

so injured, and neither said criminal proceeding nor said civil action, in any stage of the same, shall be a bar to a conviction or to a recovery in the other." This section authorizes a recovery for damages which were caused by any of the acts prohibited by the preceding section. It follows that if they may be committed without knowledge of the condition of the cattle, although reasonable care had been exercised to ascertain it, and without an evil intent, persons injured by them may recover damages caused thereby, without regard to the knowledge or intent of the persons who committed them, and without regard to the diligence they used to avoid them. The right of recovery extends to all acts causing damage which are made criminal by the statute. Section 4058 is in the nature of a police regulation. In *Railway Co. v. Husen*, 95 U. S. 465, it was admitted that, in the exercise of its police powers, a state may enact laws for the protection of property within its borders, and to that end may exclude animals having contagious or infectious diseases; and the same doctrine has been announced in other cases and is well settled.

It is said, however, that the statute under consideration, so far as the rule of liability thereunder is involved is not essentially different from that construed in *Small v. Railway Co.*, 50 Iowa, 338, and that the doctrine of that case should be applied in this. It does not seem to me that there is anything to justify the presumption that the general assembly intended to incorporate the doctrine of the *Small case* in its revision of sections 4058 and 4059 of the Code. The originals of those sections were enacted by the twelfth general assembly in the year 1868, and were incorporated, in a modified form, in the Code of 1873, nearly six years before the opinion in the *Small case* was filed. Both the act of 1868 and the Code made it unlawful for any one to

bring into the state Texas cattle, and provided for the recovery of damages by persons injured by violations of the law, and contained nothing to indicate that such violations would depend upon the knowledge or negligence of the person who should bring the cattle into the state. In that respect those statutes were in legal effect, the same as the act of the twenty-first general assembly. An additional reason for concluding that the general assembly did not intend to adopt, in the act of 1886, the construction placed upon section 1289 in the *Small case*, is the fact that the opinion in that case was founded almost wholly upon considerations which have no application to the act under consideration. The portion of section 1289 construed in the *Small case* is as follows: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock." The court said: "The first clause of the provision might seem to create an absolute liability. It makes the company liable for all fires caused by the operating of its road. If this provision stood alone, it would go far to support the plaintiff's construction (that the liability created is absolute, not depending on the negligence of defendant), although it would not necessarily sustain it, as we will hereafter endeavor to show." The court concluded that the liability was not absolute, for the reasons, *first*, that the first clause was coupled with a provision which provided for the manner of recovery; *second*, that when a fire occurs in the legitimate use of railway property, without fault in the mode of use, and simply by the intervention of an uncontrollable element of nature, the cause of the fire is to be referred to the element, and not to the use; *third*, that in paying the damages for its right of way the railway company compensates the property owner for

the dangers to which his property is exposed by operating the railway; *fourth*, that the statute was of doubtful construction, and it was, therefore, proper to give some weight to what might be considered as demanded or forbidden by the public interest; *fifth*, that contributory negligence of the property owner would defeat recovery when the corporation was in fault, and should also defeat it when the corporation was not in fault. It seems to me apparent that the first, second and third grounds of the opinion, as I have stated them, do not exist in this case. The language used in the statute of 1886 is not doubtful, but direct and clear, and the policy of the statute is not a matter for judicial consideration. The conclusion of the opinion, that the corporation is not liable when the property owner is guilty of contributory negligence, is contrary to the rule adopted by this court in *West v. Railway Co.*, 77 Iowa, 654, 35 N. W. Rep. 479, and 42 N. W. Rep. 512, and other cases. Whether the decision in the *Small case* is correct is, it seems to me, a question which is not involved in this case, and which there is no occasion to determine.

The Kansas cases cited in the opinion of the majority rest in part upon a statute enacted after the one which was directly involved, but upon the same subject, which provided that, when the cattle which communicated the disease were brought into the state from a place south of the thirty-seventh parallel of north latitude, that fact should be taken as *prima facie* evidence that the cattle were capable of communicating, and liable to impart, the disease, and that the owner or person in charge of the cattle had full knowledge and notice thereof. Our statutes contain no provision of that kind. It is said the principle stated in 3 Greenleaf on Evidence, section 21, "can have no application to one who, in the pursuit of a lawful calling, and in the exercise of proper care and caution, does an

act contrary to some statutory requirement." So far as that statement refers to acts which are prohibited by statutes, without regard to the knowledge or intent with which they are committed, and especially those in the nature of police regulations, it seems to me to be contrary to the authorities, including decisions of this court, and not to be well founded in reason. It is well settled that honest ignorance of the law will not excuse its violation, and in many cases it is as reasonable and as consistent with a due regard to liberty and property to provide that honest ignorance of a fact shall not excuse a violation of a law which is demanded by public policy.

The oleomargarine act of Pennsylvania does not prohibit the acts therein contemplated in terms any more direct and positive than does the statute under consideration, and the language used by the supreme court of that state which I have quoted is, in the main, applicable in this case. The statutory definition of the offense charged against defendant "embraces no word implying that the forbidden act shall be done knowingly or willfully, and, if it did, the design and purpose of the act would be practically defeated." The general assembly intended to protect the large and growing cattle interests of this state from the danger to which they would be exposed if cattle in the condition specified in the act should be brought into the state. It was for the general assembly to determine whether that danger, and the interests threatened, were "so great as to justify an absolute and indiscriminate prohibition." If a railway corporation may excuse its act in bringing into this state prohibited cattle on the ground that it did not know their condition, and could not, with ordinary and reasonable care, have ascertained it, then it seems to me evident that the statute must fail to accomplish its purpose to a great extent, if not wholly; and that is especially true if the corporation may be required to receive such

cattle, and deliver them to the consignee within this state, without regard to their condition; and I understand the opinion of the majority to hold, in effect, that when a loaded car, although containing prohibited animals, is tendered to such corporation, it is its duty to receive and forward it, and to act promptly in doing so, and that such duty may forbid such a delay as would be required to ascertain their condition. That it is necessary to so hold to sustain the opinion appears from the fact that, if the mere conclusions set out in the portion of the answer demurred to are disregarded, no effort whatever on the part of the defendant to ascertain the condition of the cow is shown. The theory of the answer seems to be that as the defendant had no actual knowledge of the condition of the cow, and could not have ascertained it readily by inquiry, it would not have been justified in delaying to receive and forward the car until it could ascertain the fact. If that is the law (and under the rule of the majority opinion it seems to be), the cases in which railway corporations bringing prohibited cattle into this state can not show lack of knowledge must be few; for such cattle will ordinarily be received from other railways, loaded in cars, and forming part, or all, of full car loads, and the obligation to receive and forward them without delay will be as pressing as it was in this case. It is said that the objection that, under the construction adopted by the majority, the statute will have little, if any, effect, is groundless, and the result of the decision in the *Small case* is cited in support of that statement. But the character of the cases contemplated by section 1289 of the Code is wholly unlike those for which the statute under consideration provides. When property is destroyed by fire from a locomotive engine, the circumstances attending its destruction are, or may become, fully known to the owner, and proof of them is readily obtainable. For that reason he may be able

to overcome the *prima facie* showing of the railway company that its engines were in good order, and that it was free from negligence in setting the fires. But to rebut proof of care, and want of knowledge, on the part of the company in cases arising under the statute in controversy, the person injured would be compelled to seek evidence of a kind difficult, if not impossible, to ascertain, beyond the limits of the state and in unknown quarters, and practically he would be in the power of the company. I do not think that a railway company can be compelled to receive and bring into this state, without delay, freight in car lots which includes prohibited cattle. The act prohibiting them is valid, and, so long as it stands, its violation is not required by any act of congress or of the general assembly.

The hardship involved in holding the defendant liable if it could not, with reasonable diligence, have discovered the actual condition of the cow, is evident, and might well be considered by the general assembly in determining whether criminal liability should be incurred in such cases; but, so long as the statute creates the liability, the courts should not interfere to defeat the legislative purpose. That hardship and apparent injustice sometimes result from the enforcement of criminal statutes is inevitable; but that is not a sufficient reason for not enforcing them, nor for adopting a rule of construction which may do justice in exceptional cases, but which will tend to defeat it in others. In this case it would not be a greater hardship to require defendant to pay the damages which its act in bringing the cow into the state caused than it is for the plaintiff to sustain it without compensation, and, if both parties are equally free from negligence or intentional wrong, there would be an element of justice frequently recognized by the courts in compelling the one whose act caused the loss to bear it. That the statute in question was intended to create an absolute

liability for the bringing into the state of prohibited cattle, without regard to the knowledge or intent with which it was done, is further shown by the general course of procedure in regard to criminal statutes which was pursued by the general assembly which enacted it. That body passed seventeen acts which were of a criminal character, or contained penal provisions. Two of them—chapter 66 of the Acts of the Twenty-First General Assembly, relating to the sale of intoxicating liquors, and chapter 83, relating to the practice of pharmacy—related to subjects upon which it is admitted the general assembly may properly legislate, creating liability for prohibited acts without regard to the knowledge with which they are committed, and need not be considered. Of the remaining fifteen, chapter 30, relating to embezzlement; chapter 63, relating to fish dams; chapter 76, relating to foreign corporations; chapter 78, relating to the funding of indebtedness of certain cities; chapter 79, prohibiting traffic in hogs which died of disease; chapter 104, regulating the practice of medicine; chapter 117, relating to mortgaged personal property; chapter 148, providing for a custodian of public buildings; chapter 161, in regard to elections; and chapter 177, relating to obscene literature,—contained provisions of a penal nature, without in terms making knowledge or intent an element of the act prohibited; but in each case the act is of such a nature as necessarily to involve knowledge, or negligence in not obtaining it. Chapter 52, relating to imitation of butter and cheese; chapter 65, relating to mutual benefit associations; chapter 165, relating to the sale and transfer of grain; and chapter 174, to prevent fraud in canned food,—create offenses which may, for convenience, be divided into two classes: *First*. Those which involve the doing of an act prohibited, or the omission of an act commanded, where knowledge that the act or omission is unlawful

exists from the nature of the case, unless there has been negligence to obtain it; and, in those cases, words requiring knowledge as an element of the offense are not used in the statute. *Second.* Those acts or omissions which are prohibited, but which are not made criminal, unless the act or omission is with knowledge that it is unlawful; and in the definitions of those offenses—some eight or more in all—the word “knowingly” is used in each case. Thus, section 2 of chapter 52 makes it a misdemeanor for any person who manufactures imitation butter or cheese to omit to mark it in the manner prescribed in the act. It is not said that the manufacturer must know of the omission in order to commit the offense, but it is within his power to know and prevent it. The next four sections provide for various offenses, but make knowledge a necessary element of each of them, in terms which can not be misunderstood. Thus, section 3 provides that “no carrier shall knowingly receive for the purpose of forwarding or transporting any imitation butter or imitation cheese,” unless it shall be marked and consigned in the manner prescribed. Section 8 makes the possession or control of imitation butter or cheese, not marked as required by the act, presumptive evidence of knowledge on the part of the person having such possession or control. Chapter 156 is the only one of the seventeen Acts of the Twenty-First General Assembly referred to, if chapter 66 be excepted, which prohibits an act which may be committed in honest ignorance that it is forbidden, without, in terms, making knowledge that it was forbidden necessary to a conviction. The general assembly was careful to provide that a carrier should not be liable to a fine of not more than one hundred dollars, nor to imprisonment not exceeding thirty days, for receiving imitation butter or cheese not properly marked and consigned, unless it was done with knowledge of the fact. The omission to provide

that the acts prohibited by the statute under consideration must be done with knowledge to create the heavier criminal liability, civil liability, in view of the rule followed in other cases, is most significant. It seems to me the omission can have but one explanation, and that is that in enacting chapter 156 the general assembly designed to make the prohibited act penal, and to create an absolute liability, without regard to the knowledge of the party committing it. The facts in this case tend strongly to justify the general assembly in adopting stringent measures to keep out of the state cattle in the condition described in the statute. The bringing into the state of one cow resulted in the death of thirty-two cattle owned by the plaintiff. If shipments into the state of cattle in condition to communicate to other cattle the disease contemplated by the statute were numerous, the loss which such shipments might cause to the cattle industries of the state is beyond computation. That fact was known to the general assembly when the statute was enacted, and no doubt was felt to be a sufficient justification of the severe provisions which it contains. It seems to me that the interpretation of the statute adopted in the opinion of the majority is contrary to the legislative intent, and that its practical effect will be to defeat the legislative will.

CHAS. COHOON, Appellant, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Train Running at Unlawful Speed: Injury to Property Other than Stock at Large at Point Where Fencing is Not Required. Under Code, section 1289, there is no liability for damages caused by running a train at unlawful speed at a point where the company is not required to fence, as at depot grounds, except for injury to live stock "running at large." (2)

SPEED NOT NEGLIGENCE PER SE. Running a train upon depot grounds at from twenty-five to thirty-five miles per hour is not, in the absence of statute, negligence *per se*. (3)

90	169
103	583
90	169
103	130
90	169
118	354
90	169
138	551

Appeal from Adams District Court.—HON. H. M. TOWNER, Judge.

WEDNESDAY, JANUARY 31, 1895.

ACTION to recover damages for personal injuries, and for damages to horses and wagon. Jury trial. Verdict, by order of court, for defendant. Plaintiff appeals.—*Affirmed.*

James G. Bull and *Thomas L. Maxwell* for appellant.

Smith McPherson and *H. T. Granger* for appellee.

KINNE, J.—I. The petition charges the defendant with negligence in running its train, which struck defendant's wagon and caused the injuries, on the depot grounds in the city of Villisca, at a greater rate of speed than eight miles per hour. It is averred that by reason thereof the accident happened, and that plaintiff did not contribute thereto. It is also claimed that defendant was guilty of negligence in the speed at which it ran its train, regardless of the statutory negligence pleaded. The answer was a general denial. The court, at the close of plaintiff's testimony, and on defendant's motion, directed the jury to return a verdict for defendant, which was done.

II. The first question raised for our consideration is as to whether defendant was guilty of statutory negligence in running its train at a greater rate of speed than eight miles an hour within the depot grounds of defendant. There is no dispute as to the facts touching this matter. All the evidence showed that the train, at the time of the accident, was running at a speed of from twenty-five to thirty-five miles an hour upon depot grounds necessarily used by the company and the public. The statute relied upon by appellant

is Code, section 1289. In order to present the matter intelligently, it is necessary to set out this section, as the particular clause in controversy is so connected with the balance of the section that, to properly construe it, it should be read in connection therewith. The section reads: "Any corporation operating a railway, that fails to fence the same against live stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto; provided, that no law of this state, nor any local or police regulations of any county, township, city or town, regulating the restraint of domestic animals, or in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless so specifically stated in the law or regulation. The operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section. And provided further, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damages may be recov-

ered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages." The original of this section was enacted in 1862. See chapter 169, section 6, Acts of Ninth General Assembly. As originally passed, the act did not contain any provision limiting the speed of trains upon depot grounds. That provision first appears in the Code of 1873, and in its present form. The section, as it now reads, contains a provision making railway companies liable for killing stock running at large, at all points where they have a right to fence, and have not done so, if the damage or injury resulted from a want of such fence. It contains a provision making such companies liable for damages by fire set out or caused by them in the operation of their roads, and also the provision in controversy, relating to the rate of speed upon depot grounds.

We think the provision in controversy has no relation to a case like that at bar. Before this speed-limit clause was inserted in this section, the section fully provided for liability for damages to live stock running at large, at all points where the company had a right to fence its right of way. This court had repeatedly held, after this original section was adopted, that railway companies were not required to fence where, in view of the public convenience, it would not be fit, proper, or suitable to do so. We need not cite the cases. They covered depot grounds. There was then no statutory provision whatever touching the liability of railway companies for damages to stock which might be injured while running at large at depot grounds, or other places where the necessities of the public in connection with the railway company were such as to prevent the latter from fencing its track. It was for the purpose of affording statutory relief in such cases that this speed-limit clause was inserted in this section. It is urged that the language used is general, and must,

therefore, be held to apply to all cases of injuries to persons or property at depot grounds. This court has already held that this section did not cover a case of an injury to a horse and wagon which were being driven across the tracks of a railway within the limits of depot grounds. It was said that: "As the horse killed was not running at large, the material inquiry is whether the plaintiff was entitled to recover under this section. This inquiry must be answered in the negative. It seems to us that it is not possible to construe the statute otherwise. This is what the statute plainly says. "The only liability under it is for stock injured or killed, which is running at large." *Johnson v. Railway Co.*, 75 Iowa, 158, 39 N. W. Rep. 242. It will thus be seen that this court has already said, in substance, that this statute has no application to anything except cases of stock running at large, and has expressly said that a case of stock killed on depot grounds by a train running at a rate of speed greater than eight miles an hour, and which is at the time being driven by the owner, is not within the protection of the clause limiting the rate of speed. If appellant's contention is correct, this provision limiting the rate of speed applies to all cases of damages to persons and of damages to stock, whether running at large or in the control of the owner. There can be no reason why, if the words are to be construed generally, and without reference to the connection in which they are used, and without regard to what gave rise to their insertion in this section, they should be held to apply to a case of injury to a person, and not to an injury to an animal being driven by that person. Yet such would be the result, unless we should overrule *Johnson's case*. The use of the word "public" in no wise tends to make this provision of the statute of general application. That, and the words preceding it in the same sentence, are simply descriptive of the place or places where the operation of trains at a greater rate

of speed than eight miles an hour shall be deemed negligence. This provision of the statute is not ambiguous, nor do we think the legislative intention, as evidenced by the language used, is doubtful. In construing statutes, we may take into consideration all acts relating to the same subject-matter. The legislature has expressly vested in cities and towns power to limit by ordinance the speed of trains. Code, section 458. There was, then, no need of another statutory provision covering the same matter within the same territory. No mischief remained to be remedied by a statute limiting the rate of speed upon depot grounds, as the several cities and towns in the state were clothed with ample authority touching that matter. There is then no seeming necessity, even, for giving this provision of the section the broad construction contended for by appellant, and which, to our minds, is not warranted by the language used, when we consider the circumstances under which the provision was enacted, and its evident object when viewed in the light of the balance of the section. We therefore hold that the provision under consideration applies only to cases of damages or injuries to live stock running at large. There was, then, no statutory negligence in this case.

III. As to negligence, other than statutory, it may be said that this court has frequently decided that no particular rate of speed can be said to be, *per se*, evidence of negligence, in the absence of statutory regulations. It may be considered in connection with other matters as showing negligence. *McKonkey v. Railway Co.*, 40 Iowa, 205; *Artz v. Railway Co.*, 44 Iowa, 284; *Latty v. Railway Co.*, 38 Iowa, 250. In this case there is no evidence that the defendant was negligent in the rate of speed at which it ran its train. There is no claim that the whistle was not sounded or bell rung, and no other facts which show that the rate of speed at which the train was running was, under all the circum-

stances, such as that it can be said that defendant was guilty of negligence. It follows that as no negligence was established, as against the defendant, there could be no recovery in this action, regardless of the question of plaintiff's negligence, which, in the view we have taken as to the other branch of the case, we need not consider. The court properly directed a verdict for the defendant. **AFFIRMED.**

LUDLOW, CLARK & COMPANY, Appellants, v. J. SZOLD,
 MRS. J. SZOLD, Defendants; J. K. LEE
et al., Intervenors.

90	175
142	278

Venue: Residence of Defendant. S., who had been living in a rented house and doing business in Sioux City, gave up the key to his store and left on October 28, his family leaving soon thereafter. Five days before, he inquired of a railroad agent in Fort Dodge about some goods which S. had shipped there to G. and ordered that a car of goods billed to S. at Sioux City be delivered to G. On November 10, he registered at a hotel in Fort Dodge, inquired for rates, and said that he expected to go into a commission house there. Four days later the sheriff found him, "seemingly running G.'s store" in Fort Dodge, and took the goods and key away from him. There was some evidence that S. was helping G. on November 15. On November 16 S. could not be found. *Held*, that, as to an action aided by attachment begun in Sioux City, a finding that S. was not a resident of Sioux City on that day, but a resident of Fort Dodge, will not be interfered with, though a second attachment had discovered some property of S. in Sioux City. **ROBINSON, J., dissenting.** (1)

ABANDONMENT OF RESIDENCE, HOW PROVEN. While the acquiring of a new residence is convincing proof that the old has been abandoned, it is not the only evidence by which abandonment may be shown. (2)

Appeal from Woodbury District Court.—HON. SCOTT M. LADD, Judge.

THURSDAY, FEBRUARY 1, 1894.

ON NOVEMBER 15, 1889, plaintiffs commenced this action, asking for an attachment, and to recover for goods sold and delivered. On the same day an attach-

ment was issued to Webster county, and on that day levied upon certain chattels, the property of defendant J. Szold. Intervenor filed their petitions, alleging that on November 16, 1889, and subsequent days, they severally brought actions in the district court of Webster county against J. Szold, and obtained judgments therein; that attachments were issued in said actions, which attachments were, upon said sixteenth day of November, levied upon the same property in Webster county on which plaintiffs' attachments had been levied. They allege that on November 15, 1889, defendants were not residents of Woodbury county, had no property therein subject to levy, were not served personally by plaintiffs in Woodbury county, and that, at the time intervenors brought their several suits, J. Szold was a resident of Webster county, and had therein the property levied upon, and that plaintiffs reached no property by attachment in Woodbury county. Intervenor ask that their liens upon the property attached be declared paramount and superior to the plaintiffs'. Plaintiffs answered these petitions, denying all allegations thereof, except as to the suits of the intervenors, the levies of their attachments, and the rendering of judgments. By agreement the issues, as to all the intervenors, were tried together to the court. Judgment was rendered in favor of intervenors, from which judgment plaintiffs appeal, assigning as errors that the judgment is contrary to law, and against the weight of the evidence.—*Affirmed*.

E. J. Stason and W. P. Briggs for appellants.

S. M. Marsh, T. G. Henderson, J. S. Lothrop and R. M. Dott for appellees.

GIVEN, J.—I. The principal contention is as to the place of residence of the defendant J. Szold at the time this action was commenced, November, 15, 1889.

It was admitted on the trial that Szold had been a resident of, and doing business at, Sioux City, Woodbury county for two years prior to October 28, 1889, at which time he was living in a rented house in said city; that on Saturday, October 26, he made four chattel mortgages, due on demand, upon his stock of goods and household furniture, for an amount largely in excess of their value, and on the following Monday morning, October 28, the mortgagees took possession of the stock and closed the store under said mortgages. The following facts are shown by the evidence, with but little, if any, conflict: On Monday morning, October 28, Szold gave the key to the store to the agent of mortgagees, and inquired if anything more was wanted with him, and, on being told there was not, left the store, and was not seen there after that time. He was seen at his house on the evening of the twenty-eighth, and this was the last time he was seen in Woodbury county. Several officers who had writs to serve upon him on different days following the twenty-eighth failed to find him in Sioux City, after diligent search. Mrs. Szold was seen at the house where defendant had resided, several times within the two or three days following the twenty-eighth of October, after which she was not seen in that county, and the house was found to be vacant, and all the household goods removed. It also appears that, on October 23 or 24, Szold was in Fort Dodge, and called on a railroad agent there to see about some goods that he had shipped to Robert Grant, at Fort Dodge, and made arrangements to stop a car of apples billed to him at Sioux City, in transit, and to turn them over to Grant, at Fort Dodge. On November 10, Szold registered at the Arlington Hotel in Fort Dodge, inquired as to the rates, did not say how long he would remain, but said, "he expected to go in a commission house." He said he had been in the wholesale commission business in Sioux City, and had had hard luck, and had to

sell out everything to square up, and only had two car loads of apples left; also that he had sent his wife and family to her people in Peoria, Illinois. He remained in Fort Dodge until the morning of the sixteenth, when he and Grant left before breakfast; Szold saying that he was going east, but he did not do so. Neither Grant nor Szold were seen after that time. On November 14, when the sheriff of Webster county went to Grant's place to levy the first attachment against Szold (one that is not in question), he found Szold there, "seemingly running the business." The sheriff took possession of the goods under the writ, and received one key to the store from Szold. Others testify to Szold's assisting Grant in his business during the time he remained. On the night of November 15 the sheriff received a warrant for the arrest of Szold, and on the morning of the sixteenth was unable to find him, or to learn the direction in which he and Grant had gone.

II. If, at the commencement of this action, November 15, 1889, J. Szold was a resident of Woodbury county, then the action was properly brought in that county, and plaintiff's attachment to Webster county was authorized. Plaintiffs claim the law to be "that, where a residence is once established, it is presumed that the same continues until another residence is acquired." They contend that it is not shown that Szold had acquired a new residence before the commencement of this action, and, therefore, his residence in Sioux City is presumed to have continued. This statement of the law has support in some of the cases, notably *Church v. Crossman*, 49 Iowa, 444, and *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 5 N. W. Rep. 119. In those cases it was sought to show abandonment of the old residence by showing that a new one had been acquired. The new not yet being acquired by a concurrence of the act and intention, the old was held to continue. They do not hold that abandonment may

not be proven by other evidence than the fact of having gained another residence. In *Nugent v. Bates*, 51 Iowa, 77, 50 N. W. Rep. 76, the rule is stated thus: "When a residence is once acquired, it is presumed to continue until there is satisfactory evidence of abandonment." In the recent case of *Botna Val. State Bank v. Silver City Bank*, 87 Iowa, 479, 54 N. W. Rep. 472, it is said: "The law is well settled that, when a residence is once established, it continues until there is an actual change of habitation, with an intention to make a new residence." To hold that abandonment can be established only by evidence that a new residence has been acquired would render it impossible to show abandonment, in the cases of those whose whereabouts are unknown. While the fact that a new residence has been acquired is convincing evidence that the old has been abandoned, it is not the only evidence by which abandonment may be proven. The presumption of continued residence may be rebutted by any competent facts that show abandonment; that show "an actual change of habitation, with an intention to make a new residence."

III. Intervenor claim, not only that Szold had abandoned his residence in Sioux City prior to the commencement of this action, but also that he became a resident of Webster county. A distinction is recognized between legal and actual residence. In *Hinds v. Hinds*, 1 Iowa, 39; *Love v. Cherry*, 24 Iowa, 205; *Bradley v. Fraser*, 54 Iowa, 289, 6 N. W. Rep. 293, and other cases,—it is held that a person may be a legal resident of one place, and an actual resident of another, as when he goes from the place of his legal residence intending to return,—to reside temporarily at the other place. See, also, Code, section 3507, and *Fitzgerald v. Arel*, 63 Iowa, 105, 16 N. W. Rep. 712, and 18 N. W. Rep. 713. Legal residence as distinguished from a mere temporary actual residence, is the residence

contemplated in section 2580 of the Code, relating to the place of bringing actions aided by attachment. "The intention of the party, and his acts, are to be considered, in determining the question; and they must concur, in order to fix the fact of residence." *Cohen v. Daniels*, 25 Iowa, 90. To enter the judgment which it did, the district court must have found, not only that Szold had ceased to be a resident of Woodbury county, but that he became a resident of Webster county. There is no evidence that prior to leaving Fort Dodge he had become a nonresident of, or had even gone out of, the state. He had abandoned his residence in Sioux City. His family had gone. His property was taken from him, and his business was broken up. So far as appears, all that he owned was the property in Grant's place, in Fort Dodge. After disposing of his family, he went to Fort Dodge; inquired for rates at the hotel; said he expected to go into a commission house; was seen a few days after in Grant's place, "helping with the goods," and later in possession of the store wherein these attached goods were, "seemingly running the business," and in possession of one of the keys. He was thus engaged from his arrival, November 10, to the morning of November 16, when the property having been taken on attachments against Szold, and a warrant being in the hands of the sheriff for his arrest, he fled the country. These findings of the court upon questions of fact have the force and effect of a verdict, and must not be disturbed, if there is evidence to support them. While, if it were for us to pass upon the facts, we might find differently, we can not say that these conclusions of the lower court are not supported by the evidence. The acts of Szold, and his intention, as indicated by the facts, concur to warrant the conclusion that when he came to Fort Dodge it was with the intention of becoming a legal resident there. That within a few days, when his prop-

erty was taken, and he pursued with a warrant, he fled the country, does not disprove that he came to Fort Dodge with the intention of remaining. These conclusions being sustained, it follows that plaintiff's action was brought in the wrong county, and their attachment to Webster county was unauthorized. Code, section 2580. The fact that property of Szold was found in Woodbury county on a second attachment issued in this case did not give jurisdiction to that court. Szold, being a resident of this state, could only be sued in the county of his residence, in this action. The judgment of the district court is **AFFIRMED**.

ROBINSON, C. J. (*dissenting*).—I can not agree to the opinion of the majority. It seems to me to be contrary to well grounded rules of law, and that it, in effect, overrules several decisions of this court. It is not shown that Szold had ever expressed to anyone, prior to the commencement of this action, an intention to abandon Woodbury county as a place of residence. He did not leave that county before the evening of October 28, 1889. His family were seen in the house they occupied as late as the fourth or fifth day of November. On the last of these days an agent of their landlord found the house locked, and that the family was gone. Five days later, Szold appeared in Fort Dodge, and made the statement set out in the opinion of the majority. He said he intended "to go in a commission house," but did not state where it was located, nor whether he knew what house he would enter. So far as is shown, he may have intended to return to Sioux City, and the absence of his family may at that time have been intended to be but temporary. However that may be, it is certain he neither said nor did anything which indicated a purpose to establish himself in Webster county. He appears to have been there only to help Grant for a short time—probably to dis-

pose of the apples which had been stopped at Fort Dodge, and turned over to Grant. Szold remained there only six days, when he and Grant disappeared, and neither of them has been seen in that place since that time. What became of them is not shown. In *Botnia Val. State Bank v. Silver City Bank*, 54 N. W. Rep. 472, it appeared that one Kelly disappeared from the county of his residence in September, 1889, and in May, 1891, had not returned, and nothing was then known as to where he had been staying. An action was commenced against him nine days after he had disappeared, and the original notice was served by leaving a copy thereof with a member of his family, at his former place of residence, which was described in the officer's return as his "usual place of residence." In holding the service sufficient this court said: "The law is well settled that, where a residence is once established, it continues until there is an actual change of habitation, with an intention to make a new residence. When a residence is once acquired, it is presumed to continue until there is satisfactory evidence that it has been abandoned. * * * The burden was upon the defendants to rebut the presumption that Kelly's residence was on his farm. There is no evidence that nine days after he was last seen, when the service was made, he had taken up his residence elsewhere. We are asked to presume that he had done so. No such presumption can be indulged. To do so would rebut one presumption by another. The fact of Kelly's presence in another place must be shown by evidence, and not by presumption. To say the least, no such presumption should obtain by an absence of nine days." But in this case the absence of Szold for eighteen days, six of which he spent in Fort Dodge, and the absence of his family for ten days, evidently, in part at least, for the purpose of visiting relatives of the wife, are given the effect of presumptive and suffi-

cient proof of a change of residence. In *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 5 N. W. Rep. 119, it was said: "If a person leave the place of his residence or home with intent of residing in some other place, and making it his fixed place of residence, but never consummates such intent, it can not be said his residence has been changed thereby."

Applying that rule, this court held that a person who, having a place of residence in one county, left it, and thereafter spent several years in another county, but without any fixed purpose with respect to making it his permanent place of residence, did not become a resident of the county to which he removed, within the meaning of the law in regard to the qualification of electors. In *Nugent v. Bates*, 51 Iowa, 77, 50 N. W. Rep. 76, it was said that proof that a person having a residence in this state had gone to Chicago, purchased property and gone into business, with the intention of permanently locating there, while his family continued to reside in this state did not show a change of residence. In *Church v. Crossman*, 49 Iowa, 447, it appeared that Crossman had been a resident of St. Lawrence county in the state of New York, for several years prior to the first day of February, 1872. From the middle to the last of January, 1872, he sold his household effects, preparatory to moving to the state of Michigan. On the first day of February, 1872, he went with his family to his father's house, in Jefferson county, to stay until he should be ready to go west, having before that time shipped all his goods to Michigan excepting clothing, which he intended to carry in a trunk. On the second day of February, 1872, he was served with a summons in St. Lawrence county. On the thirteenth day of that month, he removed to Michigan. He contended that when served he was a resident of Jefferson county, within the meaning of a statute which provided that no person should be proceeded against

by summons out of the county in which he was residing. This court held that when served he had not acquired a residence in Michigan, and that as he went to his father's for two weeks merely for a temporary purpose, with no intention of remaining more than a short time, he did not become a resident of Jefferson county, and that, for the purpose of the statute, he continued to be a resident of St. Lawrence county until he was served with the summons. If the abandonment of St. Lawrence county as a place of residence, made pursuant to a well settled and fully matured purpose, coupled with a two weeks sojourn in Jefferson county, did not make Crossman a resident of the latter, I am not able to understand how an absence from Woodbury county of eighteen days, with an intent as to residence at the commencement, which is not shown, and which can only be conjectured, coupled with a visit of but six days to Webster county, for the apparent purpose of selling a car load of apples, can be said to establish the residence of Szold in the county last named. There is no conflict in the evidence in regard to his residence, and the questions presented are of law, and not of fact. I do not think an abandonment of Woodbury county as a place of residence by him is shown. If, however, it be conceded that different persons might reach different conclusions in regard to abandonment, it does not seem to me that can be said in regard to the acquiring of a residence in Webster county. In *Hinds v. Hinds*, 1 Iowa, 36, it was said that, "while no definite time is necessarily implied in the word 'resident' or 'reside,' yet permanency is implied and expressly used in giving the definition." It was further said that the court was not "aware * * * of any authority that holds that a mere transient, temporary sojourn, with no intention to remain permanently, can constitute a legal residence." In *Church v. Crossman*, *supra*, it was said of the word "reside," as used

in the New York statute, that it "means a permanent and fixed, and not a mere transient or temporary abode." That definition was quoted with approval in *Bradley v. Fraser*, 54 Iowa, 291, 6 N. W. Rep. 293. It seems to me that the definitions quoted are applicable to the provisions of the Code under which this action was brought, and that, when it was brought, Szold was a resident of Woodbury county, or else that he had no residence in the state. Whether the action should not have been brought in the county where the attached property was found, because Szold had no residence in the state, is a question not discussed in the opinion of the majority; but so far as it rests upon the claim that Szold was a resident of Webster county, it seems to me to be erroneous.

PHILLIP HOMAN v. FRANKLIN COUNTY, Appellant.

Defective County Bridge: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE. A person who drives upon a bridge knowing it to be in an unsafe condition, can not recover for injuries caused by the falling of that bridge, if there was another safe and convenient passage, though he makes the attempt with care, and though the county neglected to prevent the use of the unsafe bridge, and though the public is, from its situation, invited to pass over it. (1)

MEASURE OF DAMAGES. While a general averment of damage through personal injury, in some cases, permits evidence of injury by inability to pursue a business, the rule has never been extended to injuries to the ability to conduct a farm, and, in the absence of special plea, at least, recovery by a farmer is limited to suffering, medical attendance and loss of time without reference to the profits of a farm. (2)

Appeal from Wright District Court.—HON. J. L. STEVENS, Judge.

THURSDAY, FEBRUARY 1, 1894.

ACTION for personal injuries. Judgment for plaintiff, and the defendant appeals.—*Reversed.*

D. W. Dow, County Attorney, and W. D. Evans for appellant.

90	185
98	094
90	185
110	250

90	185
137	647
90	185
138	294

J. H. Scales and Nagle & Birdsall for appellee.

GRANGER, C. J.—I. On the twelfth day of June, 1890, one of the bridges of defendant county, while plaintiff was passing over it, gave way, and fell to the stream below, in consequence of which the plaintiff was seriously injured; and this action is to recover damages thereby sustained. The following is a part of plaintiff's testimony: "I drove over that bridge a good many times during the year. I observed its condition as shaky. I noticed the bridge. It would shake—oscillate—when you passed over it. It did that morning. There was nothing stuck up to warn me from passing over it. Never saw anything of the kind stuck up there. Cross-examination: Before moving upon my present farm, I lived in Franklin county, by Whiteside's, close to this road, and about two miles from this bridge. I lived there three years. Was farming. This road comes into Ackley past the Revere House. I crossed this bridge a good many times. I noticed it was shaky for the last couple of years. I noticed the braces were out. They were down from the north, and the braces on the south and east were out a couple of inches. I noticed that every time I saw it, and I noticed the shaking every time I crossed it. It shook very much more than bridges ordinarily do, and more than a bridge ought to shake. I noticed that every time I crossed it. I was not fearful about crossing it. I thought it was safe. I never said anything to anybody about it. It shook more than it ought to. The braces were out at more than one place. That was the condition of the bridge that morning when I drove upon it. I am sure of that. I noticed that condition that morning before I drove on the bridge. I live on the county line road. There is a bridge across Beaver creek about a mile and a half east of where this bridge was, and south of my place.

There is a road leading to that bridge from my house, but there is not much travel, and I am not much acquainted that way."

Appellant asked the court to give an instruction as follows: "If you find from the evidence that the plaintiff, at the time he drove upon the bridge, knew its unsafe condition, and that it was imprudent for him to drive upon it at the time in consequence of its unsafe condition, then his own negligence contributed to the injury, and he can not recover, and your verdict must be for the defendant." The court refused it, and gave the following: "You are instructed that if there were no means taken by defendant to prevent the use of the bridge by the public, and from its location and situation the public were invited to pass over it, then the mere fact that plaintiff knew it was unsafe, even though it should appear that there was another safe and convenient way for him to reach his destination, would not render him guilty of contributory negligence if, in attempting to pass over it, he acted with ordinary care and caution, having regard for his own safety. In determining the question of whether he did exercise ordinary care in the matter you should consider all the evidence as to the condition of the bridge and the plaintiff's knowledge thereof, the circumstances under which he drove upon the bridge, and his load, whether there was another convenient and safe way he could have taken, and all other facts bearing upon the question, disclosed by the evidence, and then, if you find that the plaintiff, by his own negligence, contributed in any degree directly to the injury complained of, he can not recover in this case, even if you should find that the bridge was defectively constructed, or that the defendant negligently failed to keep it in repair, and that the plaintiff was injured in consequence thereof." It seems to us that the instruction asked states a correct rule of law. If a person about to drive on a bridge

knows it to be unsafe and knows it to be imprudent to drive thereon, and in the face of such knowledge he does drive on the bridge, he is negligent; and if he is injured in so doing his negligence contributes to his injury. The proposition seems to be without question, and it is the rule of the instruction asked.

The evidence we have quoted is such as to fully warrant the instruction. The instruction given presents, to quite an extent, a contrary rule. It, in effect, says that if a county neglects to adopt means to prevent the use of an unsafe bridge, and from its location and situation the public is invited to pass over it, a person, even though he knows it to be unsafe, and has another safe and convenient way to reach his destination, may yet, without being negligent, attempt to pass over it, if, in making the attempt, he acts with care and caution. In *Parkhill v. Town of Brighton*, 61 Iowa, 103, 15 N. W. Rep. 853, which was a case for personal injury on a sidewalk, the court below refused an instruction in these words: "If you find from the evidence that the plaintiff, at the time that she passed over the walk, knew that the walk was unsafe, and that it was imprudent to do so at that time, in consequence of the darkness, or for any other cause, and with this knowledge she persisted in passing over it, though there was another walk which she might have taken in going the direction in which she desired to go, then her own negligence contributed to the injury, and she can not recover." This court held that the instruction should have been given, and upon testimony much less conclusive than in this case. To our minds, the effect of the invitation to the public to cross or use a bridge that is really unsafe, and can not be prudently used, ceases in behalf of any person who actually knows of the unsafe condition. When such knowledge obtains, then the reason of the rule ceases, for the person does not then rely on the invitation or

apparent conditions as to safety, but he assumes the risk of using that which he actually knows to be unsuitable for use. Reasonable care and caution do not go hand in hand with one who thus assumes to act. A reasonably cautious and prudent man, with two ways open before him, one of which is safe and convenient and the other known to be so unsafe that it can not be prudently used, will not choose the latter. Such an act is one of venture, rather than prudence. The effect of giving one instruction and refusing the other was to deny to the defendant the benefit of the rule approved in the *Parkhill case*; that he was guilty of contributory negligence if he attempted to cross the bridge, knowing it to be unsafe; and that it was imprudent for him to do so when there was a safe and convenient way for his use. This holding is not against, but in harmony with, the rule in *Walker v. Decatur Co.*, 67 Iowa, 307, 25 N. W. Rep. 256.

II. On the question of damage the court permitted the plaintiff to testify to what was the income from his farm before his injuries. A few questions will indicate the rule of damage adopted:

“Q. With your appliances that you have there on the farm, what was you able to earn? A. Do you mean per year?

“Q. Per year or per day? A. I make a thousand dollars every year, besides the interest on that. (Defendant objects as incompetent, immaterial, and not responsive, and moves to strike the answer. Motion overruled, and defendant excepts.)

“Q. Are you able to do that since? (Same objection as last made. Objection overruled, and defendant excepts.)

“Q. About what difference is there in your earnings before and after per day? You made some estimate, have you not? (Objected to as incompetent,

immaterial, and irrelevant. Objection overruled, and defendant excepts.) A. About two dollars a day."

On cross-examination he made the following qualifications to such testimony:

"When I said I earned a thousand dollars a year, I meant that I made that off my farm. I could not earn a thousand dollars a year by work. I earn it on my farm.

"Q. What you mean to be understood as saying was that you could make one thousand dollars on your farm? A. Yes, sir.

"Q. Make your farm pay that? A. Yes, sir.

"Q. You don't mean to be understood as saying that you could earn three dollars a day working? A. No, sir; I mean on the farm.

"Q. All that you mean to say is that you could make your farm pay you one thousand dollars? A. Yes, sir; I could get that much out of it.

"Q. You could get it out of the crops? A. Yes, sir."

The averments of damage are: "That by reason of such injuries, suffering, and expenditure for medicine, medical services, and care, and loss of time, as hereinbefore mentioned and set forth, plaintiff has sustained damage in the sum of fifteen thousand dollars." Nothing "hereinbefore mentioned" refers to damage to plaintiff's business on his farm. The rule of general damage in cases of personal injury are those averred in the petition. The law presumes in such a case, from the nature of the injury, loss of time, suffering, and expenditure for medical attendance and care. These follow from a general averment of damages. *Suth. Dam.* [2 Ed.], section 421. This presumption sometimes extends to one's business, as in cases of incomes from professional services to which injury results, in which case the injured party is permitted to show what his business is, and what damage he has

sustained by reason of his inability to pursue the same. *Id.* We are not referred to a case holding, nor do we think, that the rule of general damage for such injuries has ever been extended to injuries to the business of conducting a farm. Certainly the law does not presume any greater loss to such a business, from such an injury, than the value of the time lost to the owner in consequence of the injury. The profits of a farm depend upon many contingencies other than the personal services of the owner. It is not for us to determine that such damages may not result and be recoverable in the way of special damage, for the question, in that respect, is not before us. We are, however, clear that, under the issues, plaintiff was limited to the value of his time lost, without reference to the profits from his farm, and that the admission of the evidence showing damage to the business of his farm and the instruction permitting a recovery therefor are erroneous. For the errors suggested, the judgment is REVERSED.

UNITED STATES BANK, Appellant, v. ANNA BURSON *et al.*

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1141	752

Principal and Agent. Where in dealing with an agent a loan company reserves the right to accept or reject all applications for loans, the fact that interest on a given mortgage which is not in the agent's possession, is paid to him, which interest he remits in order to be able to deliver up the interest coupons, and the fact that the mortgagee advised the agent that the mortgage had been assigned, confers no authority upon the agent to collect the mortgage. *Security Co. v. Graybeal*, 85 Iowa, 453, *followed*. (1)

SAME. Where one applies to his own agent for a loan to pay off an existing mortgage and the mortgagee does not know that a loan for such purpose has been negotiated, nor authorized the agent to accept or hold the money for him, the mortgage is not satisfied until said agent actually pays the money to the mortgagee. *Graybeal's case*, *ante*, *followed*. (3)

Loan Register not a Book of Account. The register of a loan agent is not admissible as "a book of account," under Code 3658, or to show the payment of a loan, but is a private memorandum of the owner. *Same case followed*. (2)

Appeal from Warren District Court.—HON. J. H. HENDERSON, Judge.

THURSDAY, FEBRUARY 1, 1894.

ACTION on a note, and for the foreclosure of a mortgage securing the same. From a judgment and decree dismissing plaintiff's bill, it appeals.—*Reversed.*

W. H. Berry and Park & O'Dell for appellant.

KINNE, J.—I. October 15, 1881, the defendants executed to the United States Trust Company their note and mortgage for three hundred dollars. The loan was to be due December 1, 1884. The petition is in the usual form for foreclosure of a mortgage. After the note and mortgage was given, the United States Trust Company was merged into plaintiff. The answer pleads that the note and mortgage was fully paid about February, 1885, to one Hugh R. Creighton, as the agent of plaintiff, and that plaintiff refuses to cancel said mortgage of record. These facts are denied in a reply. The further facts disclosed on the trial are that the note and mortgage in suit was payable in plaintiff's office, in Hartford, Connecticut; that no money was ever paid plaintiff on account of the principal; that the loan was originally made through Creighton & Hayes, of Indianola, Iowa, who were acting as agents for the Union Loan Association, of Des Moines, of which H. R. Creighton was the owner and manager. The interest on the loan was paid to Creighton & Hayes, who gave to defendants their receipts therefor. About the time this loan became due, defendants made application to the Union Loan Association, through Creighton & Hayes, for a loan for the purpose of paying off plaintiff's mortgage. This new mortgage and note ran to one Gilbert D. Kingman, of Massachusetts.

By the terms of the application of defendants for this last loan the Union Loan Association was expressly made their agent to procure the loan. It is claimed that the proceeds of this last mortgage were in fact applied to the payment of plaintiff's claim. The money, if any, received on the last loan, never came into defendants' hands, and they have no personal knowledge that the same, or any part thereof, was ever applied on plaintiff's indebtedness by the Union Loan Association.

II. To establish the fact that plaintiff's claim was paid from the proceeds of the Kingman loan defendants introduced in evidence the loan register of the Union Loan Association, which was duly objected to. This book, if not the same, was identical with that introduced in evidence for a like purpose in *Security Co. v. Graybeal*, 85 Iowa, 453, 52 N. W. Rep. 498. It was there held that such a book is not a book of accounts, but simply a private memorandum of the owner, and inadmissible for the purpose of showing payment of a loan. In that case, as in this, no proper foundation was laid for the introduction of the book, even if it was a book of accounts such as is contemplated by the statute.

III. Much evidence was introduced to show that the Union Loan Association was the agent of plaintiff for the collection of their notes and mortgages. The facts respecting this matter are very similar to *Graybeal's case*. It is clear that in procuring the Kingman loan Creighton or the Union Loan Association was acting as the agent of defendants. They made the application to him or the association for the loan. He held the money received of Kingman, if any, as defendants' agent. Neither Creighton nor the association, while holding this money as defendants', could make it the money of plaintiff, so as to work a payment of plaintiff's note and mortgage, except by send-

ing it to plaintiff, unless it, knowing that Creighton or the association had the money, consented to some other application of it, or so acted that in law it would amount to a consent that Creighton or the association should hold the money as plaintiff's agent. There is no claim that plaintiff had any knowledge that defendants were negotiating a new loan, and plaintiff was in no way connected with the transaction. There is no evidence that Creighton or the loan association had any authority to collect plaintiff's claim. After the execution of plaintiff's note and mortgage they were never in the possession of Creighton & Hayes or H. R. Creighton or the Union Loan Association. What is said in *Security Co. v. Graybeal* is applicable to this branch of the case, and need not be repeated here.

The facts herein touching the payment of interest and the general conduct of the business of Creighton and the loan association are the same as in that case, and for the reasons therein stated it has not been shown that Creighton or the loan association were the agents of plaintiff, and authorized to collect its claim; and it further appears that the claim has not been paid. The district court improperly dismissed plaintiff's bill. No competent evidence of payment having been adduced, plaintiff was entitled to a judgment and decree. It is due to the learned judge who tried this case below to say that the *Graybeal* case had not then been decided in this court. All questions arising in this action are so fully considered in that case that we need not further discuss them. The judgment of the district court is REVERSED.

POWESHEIK COUNTY for the use of the School Fund,
Appellant, v. S. A. ALLEN *et al.*

WHERE payment of a school fund mortgage finally reaches the treasury of the county, satisfaction of it will not be canceled because payment was made to the auditor instead of the treasurer.

Appeal from Poweshiek District Court.—HON. A. R. DEWEY, Judge.

THURSDAY, FEBRUARY 1, 1894.

ACTION in equity to foreclose a school fund mortgage upon certain real estate. There was a full hearing on the merits of the case, and a decree for the defendants. Plaintiff appeals.—*Affirmed.*

J. P. Lyman for appellant.

J. W. Carr and *W. H. Redman* for appellees.

ROTHROCK, J.—On the twenty-fifth day of February, 1881, the defendant Allen executed a mortgage to the plaintiff to secure a school fund loan in the sum of five hundred dollars. Payments of principal and interest were made from time to time, which are conceded to be proper credits on the loan. On the twenty-sixth day of February, 1884, Allen paid the auditor of the county the sum of forty dollars and fifty-three cents, and on the twenty-eighth day of October, 1886, he paid to the auditor the balance due on said loan, in full of principal and interest. The fact that full payment was made to the auditor is not disputed. At the time of final payment the auditor receipted therefor, and canceled and released the mortgage of record. The plaintiff seeks to set aside the cancellation of the mortgage, upon the ground that Allen did not make payment to

the treasurer of the county. In other words, it is claimed Allen ought to pay the said balances due on his mortgage twice, because he did not make payment to the officer whom the law designates as the proper functionary to receive payments on school fund loans. A large mass of evidence was introduced on the trial of the case which tends to show that the management of the different county funds, under the express direction of the board of supervisors, was, to say the least, very irregular. It appears by a very decided preponderance of the evidence that the board of supervisors authorized and directed the auditor to receive payments made on school fund loans. Without determining any question which arises on this manner of transacting the business of the county, we think the case may be disposed of by the fact that the evidence shows by a clear preponderance that the auditor actually paid to the treasurer the two amounts of money which are in dispute. The auditor testified positively that he made the payments to the treasurer. This testimony is not contradicted by any evidence in the case. If the accounts of the offices of the treasurer and auditor had been kept as they ought to have been, and the auditor did not in fact make payment to the treasurer, the records would show the exact fact. But it is impossible to ascertain from the books of the treasurer whether the payments were made to him or not. We think that it ought to be found that the money went into the treasury of the county. If the money reached the treasurer, the payment was complete, and the cancellation of the mortgage was right. *Poweshiek Co. v. Butties*, 70 Iowa, 246, 30 N. W. Rep. 558. It ought to require a much stronger case than the plaintiff made to compel Allen to pay his debt twice. **AFFIRMED.**

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110	628
90	197
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STATE OF IOWA, Appellant, v. P. G. McCONNELL.

Intoxicating Liquors: Nuisance: HABITS OF BUYER MAY BE SHOWN. On prosecution for maintaining a liquor nuisance, it is proper to show the habits of a buyer and witness as to the use by him of intoxicating liquors, and to ask him whether during the period in which he bought of defendant, he bought and used other liquors. See Acts Twenty-third General Assembly, chapter 35, section 12. And it may be shown that one who frequented defendant's place and often bought of him was in the habit of using intoxicating liquors to drink. (2)

SALE BY CLERK. On such a prosecution, defendant is liable for sales made by his clerk. Code, 1523. (3)

PERMIT A PERSONAL PROTECTION ONLY. A permit to sell liquor, granted to one member of a firm, does not protect his partner. (5)

Appeal from Poweshiek District Court.—HON. A. R. DEWEY, Judge.

THURSDAY, FEBRUARY 1, 1894.

INDICTMENT for liquor nuisance. Verdict for defendant by direction of the court. The state appeals. —*Reversed.*

J. P. Lyman for the state.

KINNE, J.—I. Defendant was indicted for a liquor nuisance, pleaded not guilty, and at the close of the state's evidence, and on the defendant's motion, the court directed a verdict for defendant. Defendant was a member of a firm composed of three persons, viz.: H. K. Snider, Dr. E. W. Clark and himself. This firm was operating a drug store in the city of Grinnell, and the sales of liquors complained of were made in said store, either by defendant or by a clerk employed by the firm. H. K. Snider was a registered pharmacist, and held a permit to sell intoxicating liquors in said

store during the time covered by the testimony in this case. In January, 1892, Snider removed to Chicago, Illinois, but retained his interest in said firm and store until after the finding of the indictment in this case. Defendant was also a registered pharmacist during the time of the sales complained of, but was not a permit holder.

II. On the trial, a witness was asked whether the liquor he had bought of defendant during the time from March until September was all that he had bought during that period, and whether during the year 1892 he used intoxicating liquors other than what he bought of defendant. These questions were objected to as being incompetent and immaterial, and the objection sustained. Section 12, chapter 35, Acts Twenty-third General Assembly, provides that "in the trial of any action or proceeding against any person for manufacturing, selling, giving away, or keeping with intent to sell, intoxicating liquors in violation of law * * * the requests for liquors and returns made to the auditor as heretofore required, the quantity and kinds of liquors sold or kept, purchased or disposed of, the purposes for which liquors were obtained by or from him, and for which they were used, the character and habits of sobriety or otherwise, shall be competent as far as applicable to the particular case. * * *" The questions asked were, under this statute, proper. Their evident intent and purpose was to show the habits of the witness as to the use of intoxicating liquor, and, under the statute, this is permissible.

III. Several witnesses testified to the purchase of liquors made by them at defendant's store, through a clerk of the firm. On defendant's motion this evidence was stricken out, to which the state excepted. This action of the court seems to have been based upon the thought that defendant would only be liable for sales made by himself. If the defendant had been a permit

holder, he would, under the statute, be liable for all sales made by any of his clerks. Acts Twenty-third General Assembly, chapter 35, section 15. Hence, if we treat him as being protected by the permit issued to his partner—a question not now decided—still he would be responsible for the acts of his clerk in making sales. We think the evidence should have been admitted. The statute expressly prohibits the manufacture or sale of intoxicating liquors by any person, his clerk, steward or agent, directly or indirectly. Code, section 1523. Defendant was one of a firm engaged in keeping the place where the alleged illegal sales were made, and is responsible for sales made by his clerks.

IV. It was sought to show by the witness Sanger that he was in the habit of using intoxicating liquors as a drink. Sanger had made a large number of purchases of liquors from defendant. The proposed evidence was objected to as being incompetent and immaterial. It was neither. It called for evidence touching the habits of the witness as to being an habitual user of intoxicating liquor. Doubtless the object of the question was to show that the witness belonged to a class to whom the defendant had no right to sell. So it was sought to show by another witness that Sanger used intoxicating liquor as a beverage. This evidence was improperly excluded. It had already been shown that Sanger was not only a frequenter of defendant's place, but, also, that he often purchased of him intoxicating liquors. Hence we think that under the section of the Acts of the Twenty-third General Assembly heretofore set out the evidence was proper. See *State v. Fleming*, 86 Iowa, 294, 53 N. W. Rep. 235.

V. We do not think that the defendant is protected by the permit granted to his partner. The granting of a permit to sell intoxicating liquors is the reposing of a special trust in the permit holder. So careful is the law in this respect that the one asking a permit

must publish a notice of his intention to apply therefor, and is required to serve a notice upon the county attorney, to make application to the district court, and to prove, among other things, that he is a citizen of the state, that he has not been convicted of violating the liquor law within a year prior to the time of making the application; that he is not addicted to the use of intoxicating liquors as a beverage; and many other conditions are attached to the issuance of the statutory permit. See chapter 35, Acts Twenty-third General Assembly. Now, if the defendant is to be considered as endowed with all the rights and privileges of a permit holder because one of his partners held such a permit, it is manifest that that personal accountability of the permit holder, which is so carefully guarded by the statute, amounts to nothing; for, as in this case, a partner who has never complied with the law, who has given no bond, who is not amenable to the court for his acts as a permit holder, can defeat the very purposes of the law whose protection he claims, and yet by virtue of which he is not accountable as a permit holder. It occurs to us there can be no question that a pharmacist, to avail himself of the benefits of the law providing for the granting of permits to sell intoxicating liquors, must have such a permit; and in a case like this it should run in the name of the firm, or in the name of each partner. This seems to be what the statute contemplates. In this case the evidence showed very little pretense of a compliance with the law. It appeared that liquors were often sold, which were used as a beverage. This appeal having been taken by the state, we need make no order touching the disposition of the case. REVERSED.

DANIEL MARIETTA V. J. C. MARIETTA, Administrator,
Appellant.

Transactions with Decedent: COMPETENCY OF WITNESS. Plaintiff may testify on a claim against the estate what the decedent's condition was and as to the care and attention required by him. (1)

Claim of Child for Service to Parent. When an adult son has ceased to be a member of the family, returns when his parents become unable to care for themselves, attends to them wholly for years and rents the farm where they live of the father, a finding that the services were rendered with the expectation on part of plaintiff and intent on part of the deceased parent that they should be paid for, will not be disturbed. *Wilson v. Wilson*, 52 Iowa, 44; *Peck v. McKean*, 45 Iowa, 18, and *Smith v. Johnson*, 45 Iowa, 308, distinguished. (2)

Appeal from Warren District Court.—HON. J. H. HENDERSON, Judge.

THURSDAY, FEBRUARY 1, 1894.

THIS is a proceeding in probate. The matter involved is a claim against the estate of Uriah Marietta, deceased, presented by the plaintiff. The claim was resisted by the administrator, and a trial was had before the court without a jury, and the claim was allowed, to the extent of five hundred and twenty dollars. The defendant appeals.—*Affirmed.*

McGarry & Brown for appellant.

No appearance for appellee.

ROTHROCK, J.—I. The plaintiff is a son of the deceased, and the claim is for personal services rendered by the plaintiff to his father in his lifetime. There is no question made that services were actually rendered. The only real controversy is whether the relations of the parties toward each other were such that the court was authorized by the evidence to find that the

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91	434
90	201
92	378
93	388
90	201
94	341
90	201
99	125
90	201
130	253
130	254

services were performed with the expectation on the part of the plaintiff, and the intention on the part of the deceased, that payment was to be made therefor. This was the ultimate question. It is claimed by counsel for the appellant that the court erred in admitting testimony of the plaintiff consisting of personal transactions between the plaintiff and the deceased, which testimony was incompetent under section 3639 of the Code. It appears from evidence, the competency of which is not in question, that Uriah Marietta lived on a farm, of which he was the owner. His wife died in the year 1888, and he died in the year 1890. For some eight years before the death of Uriah Marietta, the plaintiff, with his child—a boy now thirteen or fourteen years old—lived in the same house with his father and mother, and no other persons resided therein. The plaintiff had not always lived at his father's home. He took up his residence there, with his boy, a few years before his father's death. For about eight years before the death of the father, he was afflicted with a cancer, which finally caused his death. The testimony of other witnesses in the case shows that for some two years before his death he required constant care and attention. The disease first manifested itself on his nose, and as it progressed it affected his mouth and throat to such an extent that toward the close of life he had to be fed. He had fainting spells. He required constant care and attention. The plaintiff gave this attention personally; did the cooking and housework. The evidence shows that a reasonable compensation for the services rendered would exceed the amount allowed by the court. The plaintiff was called as a witness in his own behalf, and he was permitted, over the objection of the defendant, to describe the condition of the deceased during the progress of the disease, and the care and attention he required. It appears that the court was careful not to permit the

plaintiff to testify as to what services he rendered to his father, and the examiner of the witness did not seek to prove by the witness what services he performed. In the course of the examination of the witness the court made the following remark: "The witness will be directed to state what was the fact as to his condition, but not what he did or was required to do himself; just as to his condition—as to how he had to be taken care of." As thus limited, the evidence was competent. The object of the statute under consideration is to prevent a party or person interested in a suit from having the advantage of testifying to personal transactions or communications against an adversary whose lips are sealed by death and can not answer. The application of the statute to the various states of facts presented by cases is attended with no little difficulty. It is not easy to define just what amounts to a personal transaction, within the meaning of the statute. It is held in *Peck v. McKean*, 45 Iowa, 18, and in *Smith v. Johnson, Id.* 308, that in a case like this the plaintiff can not testify in his own behalf that he performed labor for the deceased, and that he had received no compensation therefor. As we have seen, the court, in the case at bar, directed that the witness should not testify to any such facts. It is claimed, however, that the testimony of the witness was within the statute under the rule of the case of *Wilson v. Wilson*, 52 Iowa, 44, 2 N. W. Rep. 615. The opinion in that case, so far as it involves this question, is in these words: "The plaintiff was a witness in his own behalf, and proposed to testify, as a foundation of an implied contract, to facts connected with the condition of his father, his age, etc. The evidence was rightly rejected under the rule recognized in *Peck v. McKean*, 45 Iowa, 18, and *Smith v. Johnson, Id.* 308." It does not appear what was embraced in the "and so forth," in the opinion in that case. As the two cases

above cited are referred to, the whole evidence must have related to facts from which a contract might be implied. In the case at bar no contract could be implied from the testimony of the plaintiff.

II. There is but one other question which we think demands attention: It is claimed that the evidence does not show that the service was performed with the expectation of receiving payment therefor, and that there is no showing that it was the intention of the deceased that the plaintiff should be rewarded for his labor. We doubt very much whether the familiar rule of the law that where a son or daughter remains under the parental roof, and works and labors as one of the family, after arriving at the age of majority, the presumption is that the services are gratuitously rendered, applies to the facts disclosed in evidence. In the case at bar the plaintiff had gone out into the world, and ceased to be a member of his father's family. He returned to his aged parents when they were unable to care for themselves. He rented the farm, and, as far as the evidence shows, he paid the rent to his father. The learned judge who tried the case made a special finding of facts, in which he found that, under the evidence above referred to, and the other facts in the case, the services were rendered with the expectation of the deceased and the plaintiff that the plaintiff should receive compensation therefor. We need not set out the evidence in detail. We think a fair consideration thereof authorizes the conclusion reached by the district court. **AFFIRMED.**

EDGAR S. PRICE, by His Next Friend, Appellant, v.
SAMUEL BALDAUF.

Easement in Joint Hallway: EXTENT OF RIGHT. Plaintiff's two-story building, eighty feet deep, and defendant's, one hundred feet deep, adjoined. In pursuance of an agreement, plaintiff built a party wall, and defendant a hall, on the second floor of his building, "running to rear end of building, with door in said rear end of hall," for their joint use, and, though the agreement did not, in terms, require it, a back stairs connected with the rear doors, which stairs the parties used jointly. Subsequently, defendant extended his building for twenty-five feet. *Held*, that he was not bound to extend the hall through the addition with rear door and stairs, but that a door placed eighty feet from the front of the buildings into a space the width of the hall, from which space another door opened through the party wall, enabling plaintiff to reach the ground from the rear end of his building, was sufficient. (2)

Abatement: PRACTICE ON APPEAL. An appeal will not be dismissed for a change in interest which is less than a transfer of all interest. Code, 2561 and 3212, construed. (1)

Appeal from Mahaska District Court.—HON. D. RYAN,
Judge.

THURSDAY, FEBRUARY 1, 1894.

ACTION in equity for a mandatory injunction. There was a hearing on the merits, and a decree from which plaintiff appeals.—*Affirmed*.

John F. & W. R. Lacey for appellant.

John Q. Malcolm and *SeEVERS & SeEVERS* for appellee.

ROBINSON, J.—In the year 1874, Henry Price and Boyer & Barnes owned adjoining lots in the city of Oskaloosa. Each was one hundred and twenty feet in length from east to west; that of Price was twenty feet wide, and that of Boyer & Barnes was twenty-eight feet wide, and north of that of Price. The owners

proposed to improve their respective lots, and, with that in view, entered into an agreement, in writing, of which the following is a copy:

"This agreement, made and entered into by and between Boyer & Barnes of the first part, and Henry Price of the second part, witnesseth: That party of the first part agrees to construct a stairway on south side of their lot, on the west side of the public square, in the city of Oskaloosa and county of Mahaska, Iowa, at least fifty-two inches in the clear, with hall on second floor running to rear end of the building, with door in said rear end of hall. Second party, for the use of said hall and stairway jointly with party of first part, agrees on his part to build the middle wall of good stone foundation, and thirteen-inch brick wall two stories high, for eighty feet, and twenty feet more one story high, said wall to be built half on each party's ground, and to be owned jointly by said parties; and party of second part further agrees to pay half the cost of tin roofing over the said hall, and to put good iron doors on each opening that he may make in said partition wall. It is further agreed that, after the completion of said stairway and hall, each party shall pay half the expense of keeping said stairway and hall in repair.

"Dated, Oskaloosa, Iowa, April 14, 1874.

"BOYER & BARNES.

"HENRY PRICE.

"C. G. BYRAM, Recorder."

A building was erected on each lot, and Price complied with the requirements of the agreement on his part, paying all the cost of the party wall for eighty feet in length, and for one half of an additional twenty feet. The buildings erected were two stories in height, and one hundred feet in length. A front stairway was constructed by Boyer & Barnes, and a hallway was extended from it westward to the end of their building.

In the wall at the west end of the hall was placed a door with a transom. An outside stairway was constructed from the door westward to the surface of the Boyer & Barnes lot. At the height of about five feet from the ground, a platform was built in the stairway, from which Price made a short stairway to his lot. The second stories of the two buildings were divided into office and other rooms which opened into the hall, and the stairways were designed for the use of the occupants of the rooms, especially to enable them to reach certain outbuildings, which stood on the west ends of the lots. The door was used to reach the stairways, and to furnish ventilation and light. Price fulfilled the requirements of the agreement on his part, although he contributed nothing to the main outside stairway. In the year 1888, the defendant purchased the Boyer & Barnes lot, and also the one on the north side of it, and took possession of the property in the latter part of the year 1889. He then commenced to make extensive changes, adding twenty-five feet to the Boyer & Barnes building, making it of the same length as the one north of it, took out the partition wall, making the building into one, and removed the partitions between the rooms, converting each story into one room. At a point in the hall eighty feet from the front end of the building he placed a door, which opens into his room, but is kept closed, and is of no value, as now used, to the Price building. He connected the two stories of his building with an inside stairway placed opposite the door, and constructed a chimney at the south wall, a few feet from its west end, which projects about two feet into the space which the hall would occupy if extended. The changes which he has made cost about ten thousand dollars, and he is now occupying his rooms with a stock of merchandise which is worth about one hundred and fifty thousand dollars. Before he commenced the changes he endeav-

ored to arrange with plaintiff to cut off the hall eighty feet from the front, and construct a sufficient skylight to furnish ventilation and light for the hall, but failed. He commenced the work on his buildings, however, and the plaintiff then brought this action to restrain the defendant from closing the doorway in the rear end of the hall, from cutting off any part of the hall, and from interfering with the light and ventilation. The defendant answered the petition filed, and an application for a temporary injunction, supported by affidavits, was made by the plaintiff, and overruled by the district court. From that order the plaintiff appealed to this court, and the order was reversed. See *Price v. Baldauf*, 82 Iowa, 670, 46 N. W. Rep. 983, and 47 N. W. Rep. 1079. When the action was commenced, defendant had made the excavation for the extension of the Boyer & Barnes building, had taken out the rear wall of that building, had constructed a portion of the addition, and had commenced the flues for a heating apparatus, but the larger part of the changes were made after the former appeal was taken. After that was determined, and the cause was remanded for further proceedings, the plaintiff, by amendments to his petition, alleged, that, after the action was brought, the defendant removed the stairway and door, and closed the hall, and asked that the defendant be required to open the hall to the end of the building as extended, and remove obstructions therefrom, to place a stairway at the west end of the hall, and to make a suitable opening in the west wall for light and air, and that a door and transom be placed at the west entrance of the hallway. Upon final hearing, the district court confirmed the right of plaintiff to a front stairway and hall extending to a point eighty feet from the front of the building, and required the defendant to construct a door with a transom at that point, which the plaintiff should have a right to use for entrance into a space of

fifty-two inches beyond the door, and required the defendant further to open a door from that space through the party wall. The plaintiff was required to place good iron doors in the openings through that wall.

I. The appellee has filed a motion asking that the appeal be dismissed on the ground that, since it was taken, the plaintiff has sold his building and interest in the hall to the Oskaloosa Savings Bank. The bank has appeared in this court, and asked that the appeal be prosecuted to a final decree. It is shown that plaintiff has agreed to sell the property described to the bank, but it has not been conveyed; ten thousand dollars of the purchase price remain unpaid, and the title is retained by the plaintiff as security for the amount due him. It is to his interest to preserve the property from loss, and to protect the appurtenances belonging to it. He may do that by prosecuting to a conclusion the action he commenced for that purpose when he was the unqualified owner of the property. Section 3212 of the Code, relied upon by the appellee, does not apply to this case, for the reasons stated. Section 2561 of the Code provides that "no action shall abate by the transfer of any interest therein during its pendency." There has been a change of interest in this case since it was commenced, but not a transfer of all interest. Enough is retained to support the action to a final termination. The motion to dismiss is overruled.

II. The appellant contends that the decree rendered by the district court is not in harmony with the opinion of this court announced on the former appeal. That was rendered on the facts as then shown to us, but the right to a permanent injunction on a final hearing was not adjudicated. We are now required to determine the rights of plaintiff on the facts as shown by the evidence submitted on that hearing. When

defendant purchased the Boyer & Barnes property, the plaintiff was in possession of all the rights conferred upon him by the agreement in controversy, and defendant acquired his title with constructive, if not actual, notice of them, and subject to them. The improvements he has made are extensive, and designed to systematize and facilitate the transaction of a large business; but they were made with knowledge of the fact that plaintiff was seeking, by legal means, to protect his interests in the hall and its appurtenances. It was said on the former appeal that the contract in suit gave to the plaintiff the right of passing into and out of the hall through a door in the rear end, and that to place a door eighty feet from the front end would not comply with the terms of the contract. It does not appear to us that the obtaining of light for the hall was considered of much importance by the parties to the agreement. Light is not mentioned in it. The primary use of the door is not to furnish light, and the agreement did not provide for a transom or glass in the door, but it could have been completed without either. The door placed in the hall contained no glass. That in the transom was about two by three feet in size. The doors opening from the hall to the rooms of plaintiff were two in number, the most westerly one being within sixty feet of the front end of the building. A transom sixty feet west of that at the end of a hall fifty-two inches in width would afford but little light at the doors of plaintiff. The agreement did not, in terms, require Boyer & Barnes to furnish a back stairway, and the one they built was chiefly for their own use, although Price was permitted to use it in connection with a shorter stairway of his own. But we find nothing in the agreement, nor in the construction indicated by the acts of the parties to it, which required Boyer & Barnes to furnish a stairway at the west end of the hall for the use of Price. It was his right to have a doorway at that end of the

hall, and a stairway to use in connection with it. Boyer & Barnes extended the hall twenty feet further than they had intended to do, and constructed an outside stairway which led from it, and Price was permitted to use both the extension and stairway. No other outlet at that end of the hall was furnished him, and he was entitled to use the only one made. But the defendant had a right to extend his building to the alley in the rear, although he could not have constructed a stairway in the alley without authority therefor from the city. We do not think it can be said, from the showing now made, that the contract gave to Price the absolute right to have the hall extended to the west end of the building, wherever it should be placed, to have a doorway in the end of the hall, and to have a stairway therefrom to the ground. The contract was designed to afford him a direct way from the western part of the hall to the rear end of his lot. The second story of his building, as we now understand the record, is but eighty feet in length. If the decree of the district court is carried into effect, it will give to the plaintiff a passageway from the hall onto his own premises, and will enable him to provide means for reaching the ground, if he desires them. The openings to be made will furnish the ventilation which he asks. The changes which he demands would cost the defendant about four hundred dollars, besides interfering seriously with the arrangements he has made for carrying on his business. There is nothing in the situation of plaintiff to justify placing such a burden upon the defendant. The decree of the district court gives to the plaintiff substantially all he is entitled to demand under the agreement, and effects justice between the parties. It is, therefore, **AFFIRMED**.

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PAUL KIENE AND J. R. VOGEL v. O. F. HODGE, Appellant.

Mechanic's Lien: "COMMENCEMENT OF BUILDING" UNDER CODE, 2135, CONSTRUED. Filling a water lot in order to abate a nuisance, without any intent of building thereon, is not the "commencement" of a building erected thereon immediately after the filling is done, within Code, 2135, giving mechanics preference to all liens made after the commencement of the building. (1)

Equities as to Lien on Betterment. Where plaintiff takes a mortgage on a lot which is insufficient security for it, the money to be used to erect a building, and the loan is paid out, among others, to the lienors as the work progresses, the first material being furnished when plaintiff's mortgage was already of record, the mortgage takes precedence over the mechanic's lien as to both lot and building. (2)

Appeal from Dubuque District Court.—HON. D. J. LENEHAN, Judge.

THURSDAY, FEBRUARY 1, 1894.

O. F. HODGE is the owner of certain lots and parts of lots in block 20 in the Dubuque Harbor Improvement's addition to the city of Dubuque, Iowa, and, on the second day of June, 1890, he gave to the plaintiffs a mortgage on said lots to secure the sum of eight thousand dollars, said mortgage being filed for record on the eighteenth day of July, 1890. The Standard Lumber Company and Knapp, Stout & Company are defendants, and each files an answer and cross petition, and each claims a mechanic's lien on the lots and improvements thereon prior to plaintiff's mortgage, and, as between themselves, they contest as to the priority of their respective mechanic's liens. The district court gave judgment for each against Hodge, and decreed foreclosure of the respective liens in amounts and with priorities as follows: *First*, plaintiffs' mortgage, nine thousand, one hundred and sixty-two dol-

lars and twenty-five cents; *second*, the Standard Lumber Company's, one thousand, one hundred and seven dollars and two cents; *third*, the Knapp, Stout & Company's, five hundred and ninety-six dollars and fifty cents. The Standard Lumber Company and Knapp, Stout & Company each appeals.—*Affirmed*.

Henderson, Hurd, Daniels & Kiesel, for appellant Knapp, Stout & Company.

Longueville & McCarthy for appellant Standard Lumber Company.

Powers, Lacy & Brown for appellees.

GRANGER, C. J.—1. The lots on which the respective liens are claimed were purchased of Hon. J. H. Shields, through Peter Kiene, Jr., who took and held the title for Hodge till April 8, 1888, when he conveyed the same to Hodge. At the time Hodge took the title he gave J. R. Vogel a mortgage for one thousand, five hundred dollars, the loan being obtained through Peter Kiene & Son, as agents, which remained till June 2, 1890, when the mortgage in suit was given to the plaintiffs, through Peter Kiene & Son as agents, the one thousand, five hundred dollar mortgage being included therein. The eight thousand dollar loan by plaintiffs was for the purpose of erecting a building on the lots, and it was so used. On the twenty-sixth day of August, 1890, Hodge made a contract with one Spaulding to furnish and drive the piling for the building, and the work was commenced in a few days thereafter. The stakes to indicate the lines of the property, with a view to definitely locate the building, were set by the engineer in August or September, 1890. The plans for the building were commenced by the architect the latter part of August, 1890. No materials for the building were furnished before October, 1890. These

lots are what are called "water lots." They are in what was a slough of the Mississippi river, and were covered with stagnant water. While Peter Kiene, Jr., held the title to these lots for Hodge, he received notice from the city to fill them, to abate the nuisance. He notified Hodge, as the real party in interest, and for something over a year before the driving of the piling was commenced the work of filling these lots was going on. The deed from Shields to Kiene, in trust for Hodge, was made December 17, 1886, and from that time forward Kiene was the agent for Hodge for the sale of the lots up to the execution of the eight thousand dollar mortgage, or about that time. There seems to have been no definite purpose to build on the lots till about May 1, 1890. At that time the filling was well advanced, if not nearly complete. It may be said as a fact scarcely open to dispute that the filling was commenced and carried forward without reference to the fact of building; that is, the filling would have been done without any purpose to build. Mr. Hodge, as a witness, said: "I bought these lots in case I might need them, or sell them, or anything of that kind; the same as anybody buys lots." The filling was to a greater height than was necessary to abate the nuisance on account of the stagnant water. It is stated by one witness, who was the person placed on the lots to receive and spread the material used as filling, that the water was eight or nine feet deep, and the "fill went above twelve feet on an average." At the same time that these water lots were being filled other water lots in the locality were also being filled by the owners, to abate the nuisance; and some of them were filled above what was necessary therefor, some being filled to grade and others above grade. The filling of the lots generally was not with reference to any present purpose of building thereon, but in some cases to enhance the value, and to make the lots more salable. The controverted

question in this case is as to whether or not this filling of the lots was a commencement of the building, so as to give the mechanic's lien priority over the mortgage.

We are clearly of the opinion that it was not. Until these water lots are filled they are not proper places for the erection of buildings. The filling of these lots is rather a making of the lot than a part of the making of a building or improvement thereon. When filled they are called "made ground," or "filled ground," and they are then nothing but naked lots. The fact that they are filled merely as an improvement to the lot, without reference to building, shows that the filling is an improvement distinct from the erection of buildings. We can not better illustrate our view of what is the commencement of a building, within the spirit of the mechanic's lien law, than by giving the rule cited by appellant as adopted in *Pennock v. Hoover*, 5 Rawle, 291. It is one of the earlier cases, and has been many times cited. Let it first be said that that case involves no question as to filling, but the act there held to be the commencement of a building was the digging and walling of the cellar. The judge who delivered the opinion gave what he considered the universal understanding as to what constitutes the commencement of the building of a house, which is "the first labor done on the ground, which is made the foundation of the building, and to form a part of the work suitable and necessary for its construction." That is the rule we intend to apply. What was made the foundation of the building in this case? Not the lot as it was with its surface eight feet under water, but the ground constituting the lot when filled; and the first work done thereon was the driving of the piling. That was work "suitable" and "necessary" for the construction of the building. The rule of the *Pennock* case is adopted in *Brooks v. Lester*, 36 Md. 65, and is quoted with approval in *Conrad v. Starr*, 50 Iowa, 470. The case of *Jean v.*

Wilson, 38 Md. 288, is a somewhat significant one, as it involves the filling of water lots without any present intention of building; but in doing the filling the foundations were laid, and walls made for future use, and which were afterward used. It is held that the filling was not a commencement of the building. We think it can be fairly said in this case that the filling of the lots and the erection of the building thereon were distinct and separate enterprises. To have completed the filling of the lots, and then stopped, commenced no building. On the lot would have been no part of a building. But when the piling was driven, or a foundation started, a building was commenced, within the rule of the *Pennock* case. We are not to be understood as holding that, if the earth or filling had been placed on the lot only as the foundation for the building afterward erected thereon, the commencement of such foundation would not have been the commencement of the building, for such a case, as we view the facts, is not before us.

II. Appellants insist that in any event they should have a prior lien as to the building, and an order for its sale and removal under the provisions of section 9, chapter 100, Acts Sixteenth General Assembly. Such orders are made in the discretion of the court, under the terms of the section, and involve a finding of equities for their support. When Hodge concluded to erect the building, he applied to Kiene & Son as agents for plaintiffs, for the loan of \$8,000 to erect the building, and the loan was made for that purpose, and the money paid out by Kiene & Son to the material furnishers and others as the building progressed, including the defendant companies. The lots, independent of the building, were not sufficient security for the loan, and the mortgage was taken with the understanding that the money was to be applied in increasing the value of the security by the erection of the improvement. The

money was, in good faith, placed into the building, and the mortgage stands as a first lien upon the entire property. The equities are strong in favor of the plaintiffs. At the time defendants commenced to furnish the lumber for which their liens are claimed, the records indicated the lien of plaintiffs, and they engaged in the transaction in the full light of the facts. The judgment of the district court seems to us to be both legal and equitable, and it is **AFFIRMED**.

BAXTER, REED & COMPANY v. C. W. ROLLINS & COMPANY; C. W. ROLLINS, ALICE SCHLEITER AND RESSA SCHLEITER, Appellants.

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90	217
110	310

Scope of Partnership: CONSTRUCTION OF CONTRACT. A contract for carrying on the egg business, "for one year and as much longer as the parties may mutually desire," providing for the erection of a large building, for the putting in of twenty-five thousand dollars into the business and that, "when the stock is sold, the original investment shall be deducted and the balance divided," creates a partnership for a continuing business in which each partner has, in the absence of express restriction, the usual powers of binding the firm. (2)

INACCURATE PARTNERSHIP SIGNATURE. The signature, "C. W. Rollins & Co." will bind the firm of "C. W. Rollins," if it be the intent thereby to bind that firm, and the loan is for the firm and so treated by the loaner. (1)

LOANS. Under a partnership contract, the terms of which were known to the loaner, all the money to be used was to be furnished by the two partners, and no provision was made for any other source. By subsequent verbal agreement between the partners, not communicated to the loaner, the partners furnished but half the amount named in said original contract, and a third partner obtained a loan, representing that the others had failed to furnish the amount originally agreed on, *held*, that the loaners were, by their knowledge of the original agreement, put upon inquiry as to its subsequent modification, and that the partnership was not liable for the loan. (3)

Deposit of Partnership Funds: LIABILITY OF BANK TO PARTNERS. Where a business was carried on in the name of R., who had general supervision of it under a contract with his partners providing that proceeds of sales were to reimburse the advances made by those partners, deposits made by R., are partnership funds until after settlement between the partners, and the bank need not account to the

partners who made advances for moneys paid out on the checks of R., at least, where no claim is made that the bank has appropriated any of the funds to pay individual debts of R. (4)

Appeal from Ida District Court.—HON. GEORGE W. PAINE, Judge.

THURSDAY, FEBRUARY 1, 1894.

PLAINTIFFS bring this action to recover the balance due upon a promissory note. They allege that the defendants were a copartnership in the business of buying, preserving and shipping eggs at Ida Grove, said business being under the management and control of the defendant Rollins. That at the request of said Rollins, as a member of said partnership, plaintiffs, a partnership doing a general banking business at Ida Grove, loaned to said defendant partnership, to be used in said business, three thousand dollars, for which said partnership made and delivered to plaintiffs the promissory note set out and sued upon. The note set out is signed "C. W. Rollins & Co." The defendants Alice and Ressa Schleiter alone answered. They denied that they ever had anything to do with said note; that they were ever connected with a partnership under the name of C. W. Rollins & Co.; and deny that said Rollins had any right or authority to pledge the credit of these defendants to borrow any money for said business, and allege that the plaintiffs well knew that fact. They alleged, as further answer, that they did have a business transaction with said Rollins under a contract in writing, which is as follows, and that there was no other or different agreement, verbal or written, between them:

"This article of agreement, entered into this eighth day of October, 1889, and between C. W. Rollins, Mrs. Alice Schleiter, and Miss Ressa Schleiter, witnesseth: That the parties hereto have entered into a partnership

for the purpose of carrying on the egg business in Ida Grove, Iowa, preserving eggs with Judd's Egg Preserving Compound, the business to be carried on in the name of C. W. Rollins, he to attend to all business, and have the general superintendence of the work. That the parties hereto shall put up at once, or as soon as possible, an egg house in said Ida Grove, Iowa, to be not less than fifty by one hundred feet, two stories high and a basement; and for the purpose of carrying on the business the said Mrs. Alice Schleiter and Ressa Schleiter agree to furnish (\$25,000) twenty-five thousand dollars, as needed in the business, and out of that amount money shall be used, as much as is needed, to erect said building, and in the spring said C. W. Rollins shall replace in said fund the one half of what the building has cost. The said C. W. Rollins is to make no charge for his services, but when the stock is sold, so put down, the original investment shall be deducted, and the balance equally divided, C. W. Rollins to have one half and the other parties one half, and any stock and material on hand shall in the same manner be owned equally—C. W. Rollins one half and the other parties one half. Said contract to continue for one year and as much longer as parties may mutually desire to continue the business.

“C. W. ROLLINS.

“ALICE SCHLEITER.

“RESSA SCHLEITER.”

They allege that by the terms of said contract said Rollins had no authority to execute the note in question, or any other notes, nor to pledge the credit of these defendants or of said business for the purpose of borrowing money. These defendants, by way of counterclaim, alleged that they furnished a large amount of money to said Rollins in pursuance of said contract, with which the building was constructed, and a large amount of eggs purchased and preserved; that there-

after said eggs were shipped and sold, and the proceeds of the sale to the amount of two thousand, seven hundred and sixty dollars were wrongfully deposited in the bank of the plaintiff company; that said proceeds should have been paid to these defendants, but that the plaintiff wrongfully retained, and still retains, said money, and refuses to pay the same to these defendants; that the plaintiff company was fully advised of the terms and conditions of said contract prior to the receipt of said money, and that the same belongs to these defendants. They ask judgment against the plaintiffs for said sum, and that, if they are held liable on said promissory note, this amount may be allowed as a set-off, and credited thereon, and that they have judgment for the balance. Plaintiffs, in reply, admit that the defendants made the written contract set out, that they erected the building as alleged, and say they have neither knowledge nor information sufficient to form a belief as to whether the defendants furnished money as alleged. They admit that a large quantity of eggs was purchased and preserved, but deny any knowledge as to what the sales amounted to. They deny every other allegation in the counterclaim, except that they knew of the terms and conditions of said contract. A jury being waived, the cause was submitted to the court upon the issues, and judgment entered against the defendants Alice and Ressa Schleiter on the notes sued upon, and dismissing their counterclaim, from which judgment they appeal.—*Reversed*.

Storey & Gaines for appellants.

Homer S. Bradshaw and *Warren & Buchanan* for appellees.

GIVEN, J.—I. Appellants' first contention is that they are not liable on the note in suit, because it is not executed in the name of the partnership of which they

were members. It will be observed that the contract provides that the business was to be carried on in the name of C. W. Rollins, and that the note is signed "C. W. Rollins & Co." In *Barcroft v. Haworth*, 29 Iowa, 465, it is said: "To bind the firm, it was not necessary that the contract should be signed by all the partners, nor, if there was a firm name, that it should be used. If, by the method adopted, it was the intention to bind the firm, and especially when it was so accepted, and credit given upon the strength of the firm, it would be equally as binding as though signed in the most formal and regular manner." See, also, *Seekell v. Fletcher*, 53 Iowa, 330, 5 N. W. Rep. 200. If Mr. Rollins had authority to bind the defendant firm for this borrowed money, and it was loaned upon the credit and for the benefit of said firm, it is certainly clear that the appellants are liable therefor. There is a dispute as to whether this money was borrowed for the benefit of the defendant firm, and there is a conflict in the evidence upon this subject. The district court must have found that it was borrowed for the benefit of the firm, and, there being a conflict in the evidence, we can not, under familiar rulings, disturb that finding of the court.

II. Appellants' second contention is that the partnership contract between the defendants is unlike an ordinary partnership, where the right of a partner to borrow money for the partnership of necessity exists. They insist that this was a partnership limited to a single venture, namely, to invest the money furnished by appellants in eggs during the summer, to be sold in the winter of the year for which the partnership was formed, and that only one investment and one sale were contemplated in the contract. We can not concur in this view of the contract. The amount expended in erecting and fitting up the building, the amount to be furnished by appellants, and the provision that the

contract was to continue for one year, and as much longer as the parties might agree, preclude the conclusion that the purchase and sale of a single lot of eggs was all that was contemplated. The provision in the contract that "when the stock is sold, so put down, the original investment shall be deducted, and the balance equally divided," does not determine the scope or duration of the partnership, but only the manner in which appellants were to be reimbursed, and the profits divided. The partnership contracted between the defendants was not for a single transaction, but for "the carrying on of the egg business in Ida Grove" for one year, and as much longer as the parties might agree. It was a partnership for a continuing business, and, in the absence of restrictions in the contract of copartnership, either partner might exercise the powers usually exercised by partners.

III. The contract provides that "for the purposes of carrying on the business the said Mrs. Alice Schleiter and Ressa Schleiter agree to furnish twenty-five thousand dollars, as needed in the business." No provision is made for obtaining money to be put into the business from any other source, and we think it is evident that no greater sum was to be put into it. The appellants insist that these provisions were a restriction upon the right of Rollins to borrow money on the credit of the firm to put into the business, and that appellees, knowing these provisions of the contract, must be held to have known that he had no authority to borrow the money for which the note in question was given on the credit of the firm or its members. In the view we take of the contract, we think it is entirely clear that, under it, Mr. Rollins did not have authority to borrow money to put into the business so long as appellants did not refuse to furnish it as they agreed. The only money to go into the business was that to be furnished by appellants, and no provision

was made for obtaining it from any other source. It is true that appellants only furnished twelve thousand, five hundred dollars to be put into the business. They allege and prove that at the time the last five thousand dollars was furnished to Rollins it was agreed that nothing additional should be put in. It is also true that appellees had no knowledge of this subsequent agreement, and that at the time Rollins borrowed the money he represented to them, as a reason for doing so, that appellants had failed to furnish the full amount agreed upon in the written contract. "As partners are bound by their own stipulations as between themselves, so all who deal with them are equally bound by them, if at the time of contracting or trading with the partnership they knew the nature of their agreement with each other." *Bromley v. Elliot*, 75 Am. Dec. 183. Appellees, knowing the stipulations of the contract, are bound by it; but, as already stated, they had no notice of the subsequent agreement alleged by appellants.

Under another familiar rule, it is not necessary that they should have been fully informed as to the agreements between the partners. "They will be equally bound, if they have been informed of facts that should have led a reasonably prudent and cautious man to make inquiry." 75 Am. Dec. *supra*; *Livingston v. Roosevelt*, 4 Am. Dec. 273. Knowing, as appellees did, that, under the written contract, appellants were to furnish all the money to be put into the business, it was certainly sufficient to put them upon inquiry to be told that appellants had failed to furnish the amount agreed upon,—an inquiry that would have discovered to them the subsequent agreement by which the amount to be furnished was reduced one half. If appellees had known of this subsequent agreement, they would not have been warranted in loaning the money to Rollins on the credit of the firm. While they did not know of

it, they did know, according to Rollins' statement to them, a fact that should have put them upon inquiry before loaning the money,—an inquiry that would have discovered to them that Rollins had no authority to borrow it on credit of the firm. Our conclusion is that the court should have held, as a matter of law, that Rollins had no authority to borrow the money on the credit of the partnership; that appellees, with their knowledge of the written agreement, were bound to take notice of that fact; and that information that appellants had failed to furnish the amount agreed upon did not authorize the loan on the credit of the firm, but was a statement which should have put appellees upon inquiry.

IV. The basis upon which appellants ask to recover upon their counterclaim is that the two thousand, seven hundred and sixty dollars derived from the sale of eggs was wrongfully deposited with appellees; that, under the contract, said proceeds should have been paid to them; and that appellees, knowing that fact, wrongfully retained said money, and refused to pay it to the appellants. This claim is made upon the theory that the partnership between the defendants was limited to a single transaction,—the purchase and sale of a single lot of eggs,—and that, upon the sale being made, appellants were entitled to the proceeds to the extent of their advancement. We have seen that such is not our construction of the contract. It was a continuing partnership, "to be carried on in the name of C. W. Rollins, he to attend to all the business, and have the general superintendency of the work." Rollins transacted partnership business through the plaintiff bank, making deposits therein, and paying for eggs purchased by checks thereon. While the proceeds of sales were to ultimately come to appellants to the extent of their advancements, it was not wrongful for Rollins to deposit such proceeds with the plaintiff bank. As the contract

required the business to be done in the name of C. W. Rollins, the bank kept the account in that name, and credited these proceeds to that account. It is claimed in argument that appellees should have shown what disposition was made of this deposit, and that the evidence shows that it was, in part, at least, applied to the payment of the private indebtedness of Rollins. This branch of the case does not seem to have claimed the attention that the other part did, and the evidence is limited, and leaves it indefinite as to the disposition of this two thousand, seven hundred and sixty dollars. It will be observed that appellants do not, in their counterclaim, ask to recover because of a misappropriation of this fund to the payment of private debts of Rollins, but solely upon the ground that under the contract the money belongs to them. We think it can not be said that this money belonged to them, until there was a settlement that would determine how much of it was proceeds of sales after proper deductions, and that, until this was done, it was money of the partnership. If appellants relied upon a misappropriation of the money to the payment of the individual debts of Rollins, they should have so alleged. We think there was no error in dismissing appellants' counterclaim, but, for the error already pointed out, we conclude that the judgment of the district court must be REVERSED.

WM. OLDHAM, Appellant, v. ANCHOR FIRE INSURANCE
COMPANY.

90	225
97	278
90	225
114	156

Insurance Policy: CLAUSE AS TO CHANGE OF TITLE. Where a policy running to a partnership prohibits change in the title or possession of the insured property, a sale by two partners to the third, will avoid the policy, and the buying partner can not recover to the extent of his original interest. *Hathaway v. Ins. Co.*, 64 Iowa, 229, *followed*; *Cowan v. Ins. Co.*, 40 Iowa, 551, *distinguished*.

Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION to recover upon a policy of insurance against loss by fire. The case was tried to a jury, and on motion a verdict was ordered for the defendant. Plaintiff appeals.—*Affirmed.*

Seevers & Seevers for appellant.

Sullivan & Sullivan and *Bolton & McCoy* for appellee.

GIVEN, J.—I. But a single question is presented on this appeal, and that question is sufficiently shown by appellant's abstract of the pleadings. There was no necessity for setting out the evidence contained in additional abstracts, as it simply affirms that which is admitted in the pleadings. The pleadings show that the policy sued upon was issued to William Oldham, Jesse Garner and George Ney, insuring them against loss by fire to the amount of five hundred dollars on certain machinery described, used by them as partners in the business of mining and selling coal, which property was destroyed by fire January 16, 1891, of which due notice and proof were made. Prior to the fire, Jesse Garner and George Ney orally sold and delivered the property insured to the plaintiff, who assumed their obligations with respect thereto. After the fire, Garner and Ney, in writing, transferred said policy to the plaintiff. The policy contains this provision: "That if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, without written permission of this company

on this policy, then this policy shall be void." Plaintiff does not allege, nor is it claimed, that the company had given permission for, or had any knowledge of, said sale and delivery. The question presented is, whether that sale and delivery rendered the policy void. While it may be true, as claimed, that each partner had an insurable interest, and might have taken insurance thereon in his own name, we think it is evident that this insurance was to the partnership. The petition shows, and the answer admits, that the policy was to Oldham, Garner & Ney, not separately, but jointly. It was upon property belonging to them, and being used by them as partners in their partnership business, and the insurance was in the sum of five hundred dollars to the three persons insured. The only facts disclosed in the evidence not shown by the pleadings is that this partnership was known as Oldham, Garner & Ney, and sometimes as Standard Number 2. If a note had been given by or in the name of these three persons on account of this insurance, their liability as a firm would hardly be questioned, nor their right to recover as a partnership if the loss had occurred before the transfer. We think the case is exactly within the rule announced in *Hathaway v. Insurance Co.*, 64 Iowa, 229, 20 N. W. Rep. 164. In that case the policy was to Hathaway & Smith, a partnership, composed of the plaintiff and E. P. Smith. The policy also contained a provision that, "if the title of the property is transferred, incumbered, or changed, or if, without written consent hereon, the policy is assigned, then, and in every such case, the policy shall be void." Before the loss, the partnership was dissolved, and plaintiff bought the interest of Smith in the firm property. This court held that there was a change of title upon the dissolution of the partnership. Some stress is laid upon the use of the word "changed" in the policy. It will be noticed that the condition in this policy is

more extended than in that, or in any of the cases therein referred to. This policy is conditioned against the property being sold or transferred, or any change taking place in the title and possession. Prior to the sale and delivery to plaintiff, title and possession were in the firm of Oldham, Garner & Ney, and consequently there was not only a transfer and change in the title, but also in the possession. If it should be said that the title was in the individuals, and not in the firm, still there was a change of possession, for unquestionably it was the firm that was using and had possession of the property. In *Cowan v. Insurance Co.*, 40 Iowa, 551, the policy was issued to plaintiff on a stock of goods. He thereafter formed a partnership with one Haskins under the firm name of Cowan & Haskins, and transferred the insured property to the firm. The policy was conditioned against alienation without the consent of the company. This court held that, as the plaintiff retained an insurable interest in the property, the policy protected him to the extent of his interest. The distinction between that and the case of *Hathaway* is clearly pointed out in the latter case. The same distinctions exist between that case and this, and it is not authority for saying that this appellant is entitled to recover, even to the extent of the interest which he continuously held in the property. The reason upon which these conditions in policies are sustained is, that the company has a right to determine with whom it will contract. In the case of *Cowan* it contracted with Cowan, not only as to title, but as to possession, and the transfer did not withdraw the care of Cowan, upon which the company relied. In this case the contract was for the possession and care of the three persons insured, and not of any one of them. Our conclusion is that the judgment of the district court should be **AFFIRMED.**

E. H. ASH v. R. M. ASH *et al.*, Appellants.**Appeal by Part of Coparties: NECESSITY OF NOTICE OF APPEAL.**

The appeal of part of defendants must be dismissed where they fail to serve notice of appeal upon their codefendants. Entry of appearance on part of the latter, in this court, will not cure the omission to serve such notice. ROBINSON, J., taking no part.

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

FRIDAY, FEBRUARY 2, 1894.

THIS is a suit in equity for the partition of certain real estate. There was an issue made as to the extent of the interests of the respective parties to the land which is the subject of the suit. The court entered a decree fixing the shares of the parties in accord with the claim made by the plaintiff. A part of the defendants in the action appealed.—*Appeal Dismissed.*

J. E. Buland for appellants.

H. F. Galpin for appellee.

ROTHROCK, J.—It appears from the record that one H. C. Ash was at one time the owner of the land in controversy, and that he died seized of the same, leaving Mary A. Ash, his widow, and three children. Mary A. Ash subsequently married R. M. Ash, and afterward died. The contest arises over the question whether, after the death of H. C. Ash, his widow took a distributive share of his real estate, or a homestead therein. The court found that she did not elect to take a homestead interest in the land, and that the shares of the parties should be adjusted and fixed on the theory that she took a distributive share or dower in the land. It appears that certain mortgagees were

90	229
96	16
90	229
112	135

made parties defendant to the suit, for the purpose of adjusting their liens on the land. These mortgagees were codefendants with the appellants. They were not served with a notice of appeal to this court. A motion to dismiss the appeal was submitted with the case, on the ground that the disposition of the case in this court may be prejudicial to their interests. It appears to us that the motion must be sustained. The mortgages were not made by H. C. Ash, the ancestor of the parties, seeking a partition of the land. They were the mortgages of parties having an undivided interest in the land. Appellants seek to avoid the omission to serve notice on these parties by filing in this court certain papers, signed by them, in which they enter an appearance here. This is an appellate court, and it acquires jurisdiction of the parties by the service of a notice of appeal. There is no other method provided by law. There can be no appeal by consent of the parties. It is provided by statute that "a part of several coparties may appeal, but in such case they must serve notice of appeal upon all the other parties, and file proofs thereof with the clerk of the supreme court." Code, section 3174. See *Hunt v. Hawley*, 70 Iowa, 183, 30 N. W. Rep. 477; *Laprell v. Jarosh*, 83 Iowa, 753, 49 N. W. Rep. 1021; *Michel v. Michel*, 74 Iowa, 577, 38 N. W. Rep. 422. The appeal must be DISMISSED.

ROBINSON, J., took no part in the decision of this case.

S. M. BIBBINS, Appellant, v. W. W. CLARK & COMPANY *et al.*

Taxes on Personal Property of Partnership a Lien on Realty of Partner. Taxes due on the personal property of a partnership are a lien on the real estate subsequently acquired by any of its members. Code, section 865. (2)

90	230
97	641
1100	495

90	230
107	342

90	230
108	309
108	367

90	230
113	416

90	230
119	314

90	230
123	435
123	486

PRIOR MORTGAGES. The lien of taxes assessed on such personalty is subject to mortgages on such real estate, older than the lien of such personal property tax. *GIVEN and ROTHROCK, JJ., dissenting. Trust Company v. Young*, 81 Iowa, 732-738, *overruled*. (3)

Recovery of Back Taxes: Demand, a Condition Precedent. A petition to recover taxes erroneously exacted is demurrable if it fail to allege that a claim therefor has been presented to the board of supervisors. (4)

BY MORTGAGEE. Mortgaged land was sold for taxes levied, after the mortgage was given, on the personal property of a firm of which the mortgagor was a member, and the mortgagee was compelled to redeem the land from a sale for said tax. *Held*, that such tax could not be recovered from the county, but from the mortgagor, only. *Goodnow v. Stryker*, 61 Iowa, 261, *distinguished*. (5)

Practice: FAILURE TO MOVE FOR TRANSFER TO DIFFERENT FORUM. Where there is a failure to move a transfer, an objection that the suit should have been at law, can not be raised by demurrer. (6)

On Rehearing. Former opinion adhered to. *Brownlee v. County*, 53 Iowa, 487, criticized. *Richards v. County*, 48 Iowa, 510, and *Dickey v. County*, 58 Iowa, 289, *approved and followed*. Demand essential to recover back taxes.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION in equity. Judgment and decree for defendants. Plaintiff appeals.—*Reversed*.

W. H. Baily for appellant.

Spurrier, Dowell & Parrish for appellee Polk county.

Dudley & Coffin for other appellees.

KINNE, J.—I. The facts in this case are that during the years 1886, 1887 and 1888 defendants W. W. Clark, Lavina W. Clark and A. W. Ford were copartners doing business in the city of Des Moines under the firm name of W. W. Clark & Company; that one half of the taxes upon the personal property of W. W. Clark

& Company for 1887 were not paid by them, and the entire taxes upon their personal property for 1888 were not paid by them; that November 1, 1888, M. W. Bibbins sold and conveyed to W. W. Clark certain lots in Lee township, city of Des Moines, subject to a mortgage of ten thousand dollars and interest, which grantee assumed and agreed to pay as a part of the purchase price of said property; that as a part of said transaction, and simultaneously with the execution of said deed, W. W. Clark, for a part of the purchase price of said lots, executed and delivered to Bibbins a purchase-money mortgage on said lots (afterwards assigned to plaintiff), in which he covenanted that said premises were free from incumbrance, except said mortgage of ten thousand dollars, and that he would warrant and defend the title of said premises against all persons lawfully claiming the same; that December 7, 1889, W. W. Clark conveyed the lots to Lavina W. Clark; that January 7, 1890, plaintiff obtained, in Polk county district court, against W. W. Clark and Lavina W. Clark, a decree foreclosing said purchase-money mortgage, and under a special execution thereon the lots were sold to her at sheriff's sale, February 19, 1890, for the full amount of the mortgage debt; that December 7, 1890, the treasurer of Polk county sold said lots at tax sale to A. C. Miller for the said unpaid personal property taxes of W. W. Clark & Company, amounting to three hundred and ninety-nine dollars and twenty-three cents, and executed to him a tax-sale certificate; that February 20, 1891, plaintiff received a sheriff's deed for said property, and on March 23, 1891, brought this action; that in January, 1891, after the sheriff's sale to plaintiff, the Clarks having failed to pay interest on the ten thousand dollar mortgage, the holder brought suit to foreclose said mortgage, and in June, 1891, after the present suit was brought, plaintiff, to prevent loss, and obtain an extension and renewal of said mortgage,

was compelled to pay said personal property taxes and redeem from said tax sale to Miller; that at all of the times aforesaid W. W. Clark and Lavina W. Clark were the owners of certain real estate described, which was primarily liable for said personal property taxes. Plaintiff prays judgment against Polk county, W. W. Clark & Company, W. W. Clark, Lavina W. Clark, and A. W. Ford, and each of them, for the amount of said taxes, interest, and costs; that the tax sale be set aside, annulled, and ordered returned and refunded; that defendants' said property be decreed primarily liable for said taxes, and a special execution issue for the sale thereof; that plaintiff have such other and further relief as in equity she ought to receive. To the amended petition all of the defendants demur, alleging that the facts stated do not entitle plaintiff to the relief demanded, and defendant W. W. Clark further alleging that, if, upon the facts stated, defendant is liable to plaintiff for said taxes, plaintiff has a complete and adequate remedy at law. The district court having sustained the demurrers, plaintiff elected to stand upon her petition as amended, and, from the rulings on the demurrers and the judgment dismissing her petition and for costs, she brings this appeal.

II. Our statute provides that "taxes upon real property are hereby made a perpetual lien thereon against all persons, except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title, and the treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person to whom the taxes are assessed." Code, section 865. The taxes in controversy were assessed on personalty of the firm of W. W. Clark & Company. The real estate sought to

be holden for said taxes, and which was sold therefor, had been deeded by one M. W. Bibbins to W. W. Clark, a member of said firm. It is claimed that, as the taxes were assessed against the firm on its property, and as the lots had been deeded to Clark individually, the case is not within the statute above quoted, which makes taxes "due from any person a lien upon any property owned by such person;" that in fact the owner of the property and the person from whom the taxes are due are not the same. The question thus presented is, may taxes assessed against a firm on its personal property become a lien on the individual real estate of a partner? While it is true that taxes assessed on firm property are a demand against the partnership as such, they are also a demand against each member of the copartnership. Each copartner is liable individually for the firm debts and obligations, and these include taxes. These taxes, being due from Clark as a copartner as well as from the firm, would become a lien upon his real estate. See *Chapin v. Streeter*, 124 U. S. 360, 8 Sup. Ct. 529.

III. It is conceded by counsel that the facts in this case present for our determination the same question as that involved in the case of *Trust Co. v. Young*, 81 Iowa, 732, 39 N. W. Rep. 116, and 46 N. W. Rep. 1103. It was there held that taxes on personal property which became a lien upon mortgaged real estate after foreclosure and sale of the mortgaged premises, and prior to the expiration of the period of redemption, were a lien superior to any right acquired by the holders of the mortgage by virtue of the foreclosure and sale of the property. On a rehearing, the majority of the court as then constituted adhered to the doctrine announced in the original opinion, Justices GRANGER and ROBINSON dissenting. The writer, who has since become a member of the court, while appreciating the importance of the question presented, and being fully

impressed with the necessity of adhering to established precedents, is, nevertheless, unable to concur in the opinion of the majority of the court as then constituted in so far as it relates to the priority of liens. Taxes become liens by virtue of statute only, and, when created, the lien is not to be enlarged by judicial construction. *Cooley, Tax.*, 444; *Desty, Tax.*, 734; *Jaffray v. Anderson*, 66 Iowa, 719, 24 N. W. Rep. 527; *Trust Co. v. Young*, 81 Iowa, 732 and 738, 39 N. W. Rep. 116, and 46 N. W. Rep. 1103. Now, our statute does not provide, either expressly or by implication, that taxes due upon personal property shall be a lien upon real estate owned by such person, superior to any lien then existing thereon. It simply says, as to such taxes, they shall be a lien upon any real estate he owns, or which he may afterward acquire. To hold that a mere statutory creation of a lien upon real estate, without more, is equivalent to, and to be construed as, creating a lien superior to existing liens thereon, is, as it seems to us, not only overriding all rules of construction, but it is inconsistent with our holding in the construction of other statutes where similar language is employed. The statute provides that judgments of the supreme and district courts of this state "are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment." Code, section 2882. It has never been claimed under that statute that a judgment was thereby made a lien prior to an existing lien upon the real estate of the party. Yet, applying the rule of the majority opinion in the *Young case*, it could be said with as much reason as in the case at bar, that the lien thus created by statute was superior to all existing liens against the real estate of the judgment debtor. So it is provided in bastardy proceedings that, upon filing the complaint, "a lien

shall be created upon the real property of the accused," etc. Code, section 4716. Was the claim ever made that such a lien was superior to all others then existing against the land of the accused? In these and other cases which might be cited, the language used to give the lien is general, as in the case at bar. In none of them is it said that the lien shall be prior to existing liens, but in each case the priority of the lien is left to be determined by the rules of law applicable to all liens in the absence of special provisions. An examination of our statutes will show that when the legislature has intended to create a lien which should take precedence of existing liens, apt language has been used to express such intention. See Code, section 1558, and chapter 100, Acts, Sixteenth General Assembly. The section under consideration makes a clear distinction between liens upon real estate for taxes assessed thereon and liens upon real estate for taxes assessed upon personal property. In the former case the lien is "against all persons," and "perpetual;" in the latter it is simply declared that there shall be a lien.

Now, in the opinion referred to, this language of the statute is so enlarged by construction that, in effect, the statute is made to say that this lien upon real estate for personal taxes shall be superior to all other liens then existing against said real estate. The statute does not say so, the legislature has not so declared, nor can any such result be reached by applying to this provision of the statute the same rule of construction applied to like language used elsewhere in the Code. Why should a special rule of construction be created for this particular statute? What reason is there for saying that this provision, simply creating a lien, means more than it says? In the *Young case* it is said in the majority opinion: "It is a general principle in our system of taxation that when taxes are made a lien upon real estate they become prior and superior to all

mortgage or judgment liens." As to taxes assessed against personalty and by statute made a lien upon realty, without provisions for priority, the above statement, in our judgment, finds no support in the authorities. Touching this question, the supreme court of South Dakota, in the recent case of *Miller v. Anderson*, 47 N. W. 957, said: "But, reading the entire section, 1612, together, it is inexplicable to us why, if the legislature intended to put both real and personal taxes on a common footing, and make them both liens to the same extent and of the same rank, they should not have used terms at least suggestive of such intent. If by force of a general principle, as stated in the majority opinion of the supreme court of Iowa, hereinafter referred to, the lien declared was necessarily a first one, why was it not as safe to rely upon that principle in the case of real estate taxes as in the case of personal property taxes? As to the former, they were careful to state that the lien was 'against all persons;' thus definitely fixing its rank as a lien; and then, in direct contradistinction as to personal property taxes, they provide that they shall simply be a lien. Gathering the meaning and intent of this act from its language (and this is a primary rule of construction), we conclude that that part of said section 1612 which relates to personal property taxes, gives a lien for the same to the tax creditor from the time they became due upon any real property then owned or subsequently acquired by the tax debtor, subject, however, as in case of other liens created by law, to general statutes governing questions of priority or rank." A majority of the court as now constituted is in full accord with the views expressed by Mr. Justice GRANGER in his dissenting opinion in the *Young case*. The writer has given this question a careful investigation, and is convinced that the rule of the majority opinion in the *Young case* is wrong, and that by it the letter and spirit of the statute

is unwarrantably extended by judicial construction to the great detriment of other lien holders, and an effect given to that part of the statute never contemplated by the legislature. All that the statute provides as to personal tax being a lien upon real estate is that it shall be a lien, and as such it must be held to come within the general rule that its priority is to be determined as of the time the lien attached. In view of the very full discussion of this question in the *Young case* we need not say more. The mortgage lien of plaintiff, having attached to the lots prior to the time the taxes on the personalty became a lien thereon, must be held to be superior to the tax lien. The case of *Trust Co. v. Young*, heretofore referred to, in so far as it holds that taxes assessed against personal property, and which become a lien upon real estate, are a lien thereon prior and superior to existing liens thereon, must be and is overruled.

IV. Can the plaintiff recover from the county the amount of taxes paid, with interest thereon? Plaintiff seems to base her right to recover upon section 870 of the Code. That section provides: "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax, or any portion of a tax, found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon, and in case any real property subject to taxation shall be sold for the payment of such erroneous tax, interest or costs as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale, or the right or title conveyed by the treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale and the property had not been redeemed from sale." If it be conceded that plaintiff's case is within the provi-

sions of this statute, still she can not recover as against Polk county. The demurrer is the one usually interposed in equitable actions, and by it the sufficiency of the facts stated to constitute a cause of action against the county are questioned. Under our statute, before one holding an unliquidated demand against a county can sue thereon, he must present the same to the board of supervisors of the county, and demand payment thereof. This is preliminary to his right to prosecute an action against the county. It is not alleged in the bill in this case that this claim was ever presented to the board of supervisors, and payment demanded. Code, section 2610.

If we treat the claim for a refunding as a liquidated claim or demand against the county, then it seems to us under the wording of Code, section 870, heretofore quoted, it must be presented for allowance to the board before suit can be instituted. It says the board of supervisors shall direct the treasurer to refund, etc. Clearly, the statute contemplates that the board shall have an opportunity to refund without suit, and without being compelled to pay further costs incident to litigation, which they might be willing to avoid by refunding, if they were asked so to do, before an action was commenced. Here is a party claiming a refunding of certain money paid in redemption from tax sale. It is reasonable that the board should have an opportunity to pass upon the justness of his demand before the county can be put to the payment of costs. *Brownlee v. Marion Co.*, 53 Iowa, 488, 5 N. W. Rep. 610; *Dickey v. County of Polk*, 58 Iowa, 289, 12 N. W. Rep. 290; *Richards v. Wapello Co.*, 48 Iowa, 510.

V. Is plaintiff entitled to a judgment against the other defendants? It was the duty of these defendants to pay these taxes, and, as we have held in another division of this opinion, that duty rested upon them as a copartnership and also as individuals. Plaintiff re-

deemed from a tax sale of the real estate for these taxes, being compelled to do so to protect her interest in the land, and to procure an extension of the insurance company's mortgage on the premises which was prior to her own mortgage. The case is peculiar. As to all these defendants (except W. W. Clark) we discover nothing from which we can say that a promise or contract to refund the amount paid by plaintiff can be inferred. They were under no obligations to the plaintiff to pay these taxes, only in so far as that, as good citizens, it was their duty to do so. The taxes were not assessed against this land. The title to the land was not in dispute. No benefit was conferred upon their title because plaintiff made redemption, for they claimed no title to the land. The only conceivable benefit of the redemption to them was that thereby an obligation due from them to the government was discharged. If one could make another his debtor by simply paying his debt, then justice would require that these defendants should be held liable to plaintiff for the amount of their debt which she has paid. But it is said that one can not thus make another his debtor without the latter's request or consent. *Homestead Co. v. Valley Railroad*, 17 Wall. 166; *Garrigan v. Knight*, 47 Iowa, 527. The case is unlike *Goodnow v. Stryker*, 61 Iowa, 261, 16 N. W. Rep. 486, or any other called to our attention, for the reasons above given. So far as these defendants (except W. W. Clark) are concerned, there is no obligation resting upon them to reimburse plaintiff for the amount paid by her in redemption of these lots.

VI. It seems to us that W. W. Clark is impliedly bound to reimburse the plaintiff for the amount she has expended in redeeming these lots from tax sale with interest and costs. He knew these taxes were unpaid. He knew that they would in time become a lien upon these lots. The payment of these taxes, as we have said, was a matter of necessity for plaintiff in order to

preserve her lien. It was in no sense a voluntary payment. In paying these taxes she was not meddling with that which did not concern her. Clark was the owner of the lots. He owed it to the state and county to pay these taxes. As a mortgagor of plaintiff's assignor, he ought not to be permitted to take advantage of his own negligence in failing to pay these taxes, which were outstanding when he executed the purchase-money mortgage, and which, although technically not liens against the lots at the time that mortgage was executed, were, nevertheless, claims against Clark which would ripen into liens in due time, impairing the value of the security he had given plaintiff.

We think, under all the facts of this case, plaintiff should recover from Clark. It is said that, even if plaintiff is entitled to recover of Clark, she has adopted the wrong kind of proceedings; that she should have brought her action at law. That question can not be raised by demurrer. Having failed to move to transfer the cause to the proper side of the calendar in the court below, defendants have waived the error, if any, in the form of the proceedings. Code, section 2519. The court erred in sustaining the demurrer of the defendant W. W. Clark, and for that reason the decision below is REVERSED.

GIVEN and ROTHROCK, JJ., dissenting as to third division of the opinion.

SUPPLEMENTAL OPINION.

SATURDAY, MAY 26, 1894.

PER CURIAM.—Appellant contends that the plaintiff's demand is liquidated, and hence we erred in holding that the claim must be presented to the board of supervisors before an action could be maintained thereon. *Brownlee v. Marion Co.*, 53 Iowa, 487, 5. N.

W. Rep. 610, is relied upon. That case, in some of its facts, is unlike the one at bar. In it the plaintiff applied to the board of supervisors for relief before redeeming; and it does not appear as to whether or not he presented his claim to the board after he had made the redemption, and before he instituted his action. Some language is used in the opinion in that case to the effect that plaintiff was not bound to present his claim to the board in advance of bringing suit; but, as we have said, it does not appear from the statement of facts that that question was properly before the court for determination. In view of this fact, and because of the holding in *Richards v. Wapello Co.*, 48 Iowa, 510, and *Dickey v. County of Polk*, 58 Iowa, 289, 12 N. W. Rep. 290, and for the further reason that our construction of the statute seems proper, and effectuates justice, while working no hardship to claimants, the petition for a rehearing must be overruled, and the original opinion (57 N. W. Rep. 884) adhered to.

A. L. DEANE & COMPANY v. LEONARD EVERETT,
Appellant.

Notice of Agent's Authority. There can be no recovery for damages for the nonfulfillment of an order given to an agent when the buyer sees a statement on a blank order in the agent's possession, but which blank is not used, that nothing but delivery should constitute an acceptance by the principal. (2)

SAME. Whether an order which, on its face, is but the request of the signer, is binding, without acceptance, is doubtful. See *Machine Company v. Richardson*, 56 N. W. Rep. 682. (2)

Custom of Trade. Testimony that custom authorizes traveling agents to fix the price of their goods, if admissible at all, must deal with the custom prevailing in the sale of goods of the kind in suit. (3)

Verification of Pleading: HARMLESS ERROR. A refusal to strike a reply for insufficient verification is harmless where a verified amendment to it is subsequently filed without objection. (1)

Appeal from Council Bluffs Superior Court.—HON. J. E. F. MCGEE, Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION at law to recover the contract price of one iron safe sold by the plaintiffs to the defendant. There was a trial before the court without the intervention of a jury, and a judgment for the plaintiffs. Defendant appeals.—*Affirmed.*

B. W. Hight for appellant.

Sims & Bainbridge and *Montgomery, Charlton & Hall* for appellees.

ROTHROCK, J.—I. The plaintiffs are general agents for the sale of Hall's safes, bank and time locks, and their place of business is at the city of Omaha, in the state of Nebraska. On the fifth day of October, 1891, one of the agents or solicitors of the plaintiff called upon the defendant at his place of business in the city of Council Bluffs, in this state, and took from the defendant two orders, which were in these words:

“OCTOBER 5, 1891.

“*A. L. Deane & Co., Agents for Hall's Safes, Bank & Time Locks:* Please ship, as soon as possible, to Leonard Everett, town of Council Bluffs, county of Pottawattamie, state of Iowa, one number 86 X fire burglar proof safe, as illustrated on page 65 of Hall's Safe & Lock Co.'s catalogue. The inside measurement of same to be 36 inches high, 27 & 1-2 inches wide, 19 inches deep. For the said safe, delivered free in my office, directed as above, I agree to pay to your order the sum of three hundred and sixty dollars (\$360.00,)

as follows: Cash on arrival of safe, and my other safes to be placed as I may direct in my office.

“LEONARD EVERETT.

“To be delivered within 3 days.

“C. B. POPE, Agent.”

“COUNCIL BLUFFS, IOWA, October 5, 1891.

“*A. L. Deane & Co., Agents for Hall's Patent Safes, Bank & Time Locks:* Please ship, as soon as possible, to Leonard Everett, town of Council Bluffs, county of Pottawattamie, state of Iowa, one number 84 2nd hand fire McNeal & Urban safe. For said safe, delivered free in my office, directed as above, I agree to pay to your order the sum of fifty-five dollars (\$55.00), as follows: Cash on arrival of safe; the safe shown to me.

“LEONARD EVERETT.

“To be delivered within 3 days.”

These orders were taken to the place of business of the plaintiffs, when they immediately refused to accept the order for the McNeal & Urban safe, and notified the defendant of such refusal by the following letter:

“OMAHA, 10—5, 1891.

“*Leonard Everett, Council Bluffs, Iowa.*—DEAR SIR: Referring to the order for safes given our man to day, will say that it will be impossible for us to fill the orders at the price mentioned. It would be an extraordinary low price for the safes, delivered here in Omaha on first floor; and taking the cost of hauling to Council Bluffs, and hoisting to 2nd floor, from that, leaves us no margin for doing business. But we will do this: If you will add twenty (\$20.00) dollars to your offer we will accept, and place safes in your office as directed in order; otherwise we shall have to decline filling it.

“Yours, very respectfully,

“A. L. DEANE & Co.

“P.”

The other order was accepted, but nothing more transpired in the matter until October 15, when the same agent again called on the defendant, and notified him that the second order would not be filled. These two orders were written upon the same sheet of paper, and the defendant detached the last one and kept it, and delivered the first one to the agent, and said to the agent, "perform as much of the contract as you can." The plaintiffs delivered the Hall safe, and put it in position in defendant's place of business. This action was brought to recover the amount named in the first order and interest.

The defendant set up a defense and cross claim by which he demanded damages because the plaintiffs injured his building in placing the safe therein, and because the lock of the safe was defective. He further claimed damages for a refusal to comply with the order for the McNeil & Urban safe. The pleadings were verified and the plaintiffs filed a reply to the answer and cross claim, which was verified by one of the plaintiff's attorneys. The defendant moved to strike the reply from the files because the verification was insufficient. The court overruled the motion, and the defendant excepted to the ruling. The defendant then filed a written motion for the oral examination of the attorney who verified the reply, touching his competency to make the verification. The court overruled the motion, and defendant excepted. After plaintiffs closed the introduction of their evidence, the defendant called the said attorney as a witness, and examined him touching his competency to make the verification, when another written motion was made to strike the reply. The plaintiffs filed a motion to strike this motion from the files. The motion to strike the motion was sustained and the defendant excepted. It is claimed that the court erred in these several rulings. These successive motions show a novel, and rather remarkable, line of

practice. When the court made the ruling on the first motion, that should have been an end of that question in the case. We need not determine whether the ruling was right or wrong. The record shows that, after the evidence was introduced, the plaintiffs filed an amended and substituted reply, which was verified. This last reply was not attacked in any way, and the rulings of the court on the first reply were without prejudice.

II. The theory of the defense was that the two orders were an entire contract, and that defendant should be allowed to recover damages for failure to deliver the McNeal & Urban safe. This is not a material question in the case, because the evidence shows beyond all doubt that the plaintiffs had the right to refuse to accept that order. It appears without conflict that, when these orders were taken, the agent proposed to use one of the blank orders prepared and used by the plaintiffs in the business of taking orders. The defendant read that order through, and it contained the following language: "Nothing but shipment or delivery constitutes an acceptance of this order." It is true the defendant objected to this order, but not upon the ground that it was a mere order subject to acceptance. And it is also true that the defendant testified as a witness that he did not observe this provision of the order; but he testified that he "read it over" and refused to sign it. The reading of this blank order was distinct notice that the agent had no authority to take an order which might not be rejected by the plaintiffs. It is said that a copy of this blank order was not competent evidence. We think this claim can not be sustained. The paper was shown to be an exact copy of the blank which defendant read over, and it was competent evidence to show notice to the defendant of the extent of the agent's authority. The orders which the defendant signed were written in his office immediately after

reading the blank order. We have discussed this question upon the assumption that this order was a contract binding on the plaintiffs. That position may admit of much doubt. On its face it was no more than a request signed by the defendant. See *Machine Co. v. Richardson*, 56 N. W. Rep. (Iowa), 682.

III. A number of witnesses were called by the defendant by which it was sought to prove that there was a custom or usage of wholesale merchants by which their traveling agents were authorized to bind their principals by fixing the price of goods sold. None of these witnesses claimed to have any knowledge of any such custom or usage in the sale of iron safes. This was sufficient ground for rejecting the evidence. We do not determine whether such evidence would be competent in any case.

IV. The defendant complains because he was not allowed damages, for the reason that the lock of the safe was deficient, and because of the injury to his building in putting the safe in position. The judgment rendered was for three hundred and sixty-two dollars. Payment was to be made in cash when the safe was delivered. The plaintiff was entitled to interest from the time the safe was delivered to the time of judgment. A computation of the amount of interest shows that the defendant was allowed about five dollars damages. This so nearly equals the amount shown by the evidence that we would not reverse the judgment on that ground. The case demands no further consideration.

AFFIRMED.

FANNIE L. PATTERSON v. THE OMAHA & COUNCIL
BLUFFS RAILWAY AND BRIDGE COMPANY,
Appellants.

Injury to Passenger Alighting: NEGLIGENCE, IMMATERIAL PLEA. If a street car stops at a given place, though not to allow plaintiff to alight, and defendant's employees knew, or should have known, that

90	247
131	630
90	247
139	192

plaintiff was trying to alight, the starting of the car before she does so, is negligence, and while the purpose of the stop was evidence on whether defendant had actual knowledge of plaintiff's attempt to alight, an allegation in the petition that the stop was made to permit plaintiff to get off is mere surplusage. (2)

Conflicting Evidence: Review: VERDICT. On appeal, a finding of fact resting on conflicting evidence will be sustained. (1)

Harmless Misconduct. The fact that an immaterial special interrogatory is answered, "don't know," by the jury, constitutes no misconduct or ground for reversal. (3)

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

FRIDAY, FEBRUARY 2, 1894.

THE defendant company operates a line of street railway on some of the streets in Council Bluffs, Iowa, and in Omaha, Nebraska. The plaintiff resided in 1890 in Council Bluffs, and was employed as a draughts-woman in an office in Omaha. She traveled to and from her work on defendant's railway. On the twenty-eighth day of October, 1890, as she was returning to her home, and was alighting from the car at Fifth avenue, in Council Bluffs, she fell, and was permanently injured, and this action is to recover her damage. Her claim is that the car stopped for her to alight, and was then negligently started, causing her injury. The answer puts in issue the fact of negligence, and the cause was tried to a jury that returned a verdict for plaintiff, and the defendant appeals. *Affirmed.*

Wright & Baldwin for appellant.

Donovan & Evans for appellee.

GRANGER, C. J.—I. There is a claim that the verdict is without support in the evidence. Where defendant's line running on Pearl street crosses Fifth avenue is where plaintiff was in the habit of transferring or alight-

ing. The car approached Fifth avenue on Pearl street from the north. The custom of the company was, and its rules require, that the car should cross the avenue before stopping for passengers to alight. This would require the plaintiff to alight on the south side of the avenue. As she claims, the car stopped on the north side, and, as she was alighting, it started suddenly, throwing her to the ground, resulting in her injury. There is no dispute but that plaintiff attempted to alight from the car; that, in so doing, she fell, and was injured; but it is in dispute whether or not the car actually stopped, or merely "slowed down almost to a standstill," in order to make a switch. The court, under the averments of the petition, held that, to enable plaintiff to recover, she must show that the car actually stopped, and was negligently started, resulting in the injury. The jury specially found that the car did stop before it reached the south side of Fifth avenue, and, also, that it was not in motion when she attempted to alight. These findings were made under a plain conflict of evidence as to the facts. The plaintiff testified that when the car left Broadway, and turned into Pearl street, she requested the conductor to let her off at the courthouse, and he said, "All right." She said: "We hadn't quite reached the courthouse when the conductor turned and called 'Fifth avenue,' and, as he called, the car began to slack up, and we hadn't more than reached the switch when the car stopped. * * * When the conductor called 'Fifth avenue,' I prepared to get off, and, just as the car stopped, I attempted to get off, but I did not more than touch one foot to the ground when the car started, and threw me to the pavement." She further said: "The car sometimes stopped at the north side of Fifth avenue, and sometimes at the south side of Fifth avenue.* * * The car stopped more times north of Fifth avenue than south. I think a half dozen times would cover all the

times I got off on the north side of Fifth avenue." She also said that it was customary for the cars to stop for her on the north side of Fifth avenue when she requested it. These facts are denied by witnesses for the defendant, but the state of the evidence is not such as to permit us to disturb the findings of facts by the jury. It is not important that we should discuss the details of the evidence.

II. The following is the tenth instruction given to the jury: "If the evidence shows that the employees of the defendant had stopped the car on which plaintiff was riding at the place where it is claimed the accident occurred, but fails to show that such stop had been made for the purpose of allowing the plaintiff to alight therefrom, then whether the act of the defendant's employees in moving said car forward when plaintiff was attempting to alight therefrom would be negligence or not, would depend upon whether said employees knew, or in the exercise of due diligence and care, ought to have known, before starting said car, and in time to avoid the injury, that plaintiff was attempting to alight therefrom. It was the duty of the defendant's employees, in the operation of defendant's cars, to exercise the highest degree of diligence and care to avoid injury to passengers; and if the evidence shows that they had stopped the car upon which plaintiff was riding at the time in question at or near the point where it is claimed the injury occurred, but fails to show that it was stopped for the purpose of enabling plaintiff to get off, but does show that the defendant's employees knew, or, in the exercise of due care, ought to have known, in time to avoid the injury to plaintiff, that plaintiff was attempting to alight from said car, and, under such circumstances, started said car forward while plaintiff was attempting to alight, such act on their part would be negligence; and if such negligent act caused plain-

tiff's injury, without negligence on her part directly contributing thereto, defendant would be liable therefor." The criticism upon the instruction is that it raises a new issue in the case, because the petition alleges that the car "stopped for the purpose of permitting the said plaintiff to get off," and the instruction permits a recovery without reference to the purpose for which the car was stopped. The argument overlooks a very important part of the instruction, wherein it permits a recovery only in case the employees knew, after the car had stopped, that plaintiff was attempting to alight, or in the exercise of due care should have known it, and then started the car, resulting in her injury. The purpose or intention in stopping the car was not of the *gravamen* of the action. It was not a material or necessary fact to be found in the process of reaching a verdict. As an averment in the petition, it was merely surplusage. As a matter of evidence, it would be important, as showing actual knowledge of her attempt to alight, and this knowledge is what the district court adopted as a controlling fact, from which negligence could be found in starting the car. If the employees knew of her attempt to alight, either from the fact that the car was stopped for that purpose, or from any other fact, or, in the exercise of due care, they should have known it, the rule of the instruction is that it was negligence to start it while she was alighting. The rule, as a proposition of law, is hardly open to question, and the evidence in the case fully justifies the giving of it.

. III. Among the interrogatories submitted to the jury was the following: "At what speed was the train in question moving just prior to the time it reached Fifth Avenue, and as it was crossing Fifth avenue?" The jury answered: "Don't know." This is urged as misconduct. The answer was not important. Defendant admits that the train, at the point in question,

was "slowed down almost to a standstill," and plaintiff contends that it was stopped entirely. The speed of the train at other times is not important, and it seems to have been a question on which the jury did not agree, or could not reach a conclusion. Admit, for the purpose of the case, almost any answer that in reason could have been given, and it could not affect the result. It was not an ultimate fact. There are complaints as to one or two other instructions, and some general complaints as to the instructions as a whole, as that they were unfair to the defendant, but we think the complaints are without merit. The case seems to us to have been fairly submitted, and the judgment is **AFFIRMED**.

**PETER BECKMAN, Administrator, Appellant, v. THE
CONSOLIDATION COAL COMPANY.**

Injury to Servant: Contributory Negligence. Where intestate's death was caused by an open switch which it was his duty to keep closed, his estate can not recover. (1)

ASSUMING RISK OF EMPLOYMENT. Intestate had been employed in defendant's mine for a year and a half, was familiar with the switch, knew that it was often left open and that loaded cars were frequently pushed unattached to a train or cable, as the one that injured him was, and made no complaint, nor asked for any change. *Held*, that he assumed the risk incident to such a condition of things. (2)

Directing Verdict: Rule. A verdict will be directed when, considering all the evidence, it appears to the court, that it would be its duty to set aside a verdict if found for the party having the burden of proof. *Myer v. Houck*, 85 Iowa, 319, *followed*. (2)

Appeal from Mahaska District Court.—HON. J. K.
JOHNSON, Judge.

FRIDAY, FEBRUARY 2, 1894.

PLAINTIFF alleges that he is administrator of the estate of William B. Johnson, deceased; that said

90	252
100	567
90	252
104	149
90	252
113	103
90	252
123	266
90	252
124	309
90	252
127	269

Johnson came to his death while in the employ of defendant, because of certain specified acts of negligence on the part of defendant, wherefore he asks to recover damages. Defendant answered, denying generally, and alleging a waiver by the deceased as to the matters alleged as negligence, and that he was guilty of contributory negligence. At the close of all the evidence, the court, on motion, directed a verdict for the defendant, and entered judgment thereon, from which judgment plaintiff appeals.—*Affirmed.*

L. C. Blanchard for appellant.

J. F. & W. R. Lacey for appellee.

GIVEN, J.—I. The defendant was engaged in operating a coal mine, and the deceased was employed by the defendant to perform certain duties in the mine, and while so employed was struck and run upon by a loaded car, and killed. The following statement as to the arrangement of the mine, the duties of deceased, and the manner in which the accident occurred, will be sufficient for a correct understanding of the case: The mine was reached by a shaft in which two cages or elevators were operated, which we designate as the east and the west cage. From the bottom of the shaft the main entry extended south, with cross entries and rooms on each side, from which coal was brought in cars to be taken to the shaft and elevated to the surface. A track of iron rails for the passage of cars extended from the bottom of the shaft, south, along the main entry. Cars were operated on this track by means of an endless cable carried on rollers above and below the cars, propelled by a steam engine at the top of the shaft. Trains coming to the shaft took up loaded cars at points along the main entry to where they were drawn by mules from the different rooms. The cars were usually coupled together, and, when

ready to be moved, were connected with the moving cable. It was a common practice to take one or more cars onto the head of the train, and push them to the shaft without coupling them to the other cars or to the cable. At a point ninety feet south of the bottom of the shaft, what is called the empty track branched to the west from the main track, running thence to the landing of the west cage; the main track continuing to the landing of the east cage. Loaded cars from the mine were run upon the main track to the east landing. Empty cars returned from the top stood upon the empty track until taken in to be loaded. The switch by which the empty track was connected with the main track was a "spring switch," that opened and closed by the passage of cars from the empty to the main track, and which could be "latched" so that it would not close, but leave the empty track connected with the main track until unlatched. Mining was not carried on at night, but men were then engaged in taking timbers into the mine, for props, on timber cars, which were usually run over the empty track. These night men frequently latched the switch, and left it so, thereby leaving the empty track connected with the main track. The duty of the deceased, under his employment, was to go along the track, oil and repair the rollers, oil the switches, and report any repairs necessary to be made on them that he could not make, and to remove any pieces of coal or other obstructions that he found upon the track. On the morning of November 12, 1890, the deceased commenced work at the foot of the shaft, and when within twenty or thirty feet of said switch, and while on the east side of the main track, warning was given of a loaded train approaching from the south, whereupon he stepped west, across the main track, onto the empty track. Because of the switch being open, the cars ran in on the empty track; the first car running upon the deceased

and injuring him so that he died in a few hours afterward. Said front car was not coupled to the train or to the cable, but it did not separate from the other cars, but was pushed upon the deceased by them.

II. The negligence charged is, in substance, as follows: *First*. Defendant failed to provide a safe and convenient switch, and proper appliances for adjusting the same; the switch being a spring switch, which is not a safe switch, nor the most approved in use. *Second*. That defendant negligently failed to provide a safe place for plaintiff's intestate to work; that said Johnson was not aware of the unsafe condition of the switch, nor that the same was unguarded and open. *Third*. Defendant negligently failed to keep a man at said switch to adjust the same and keep it in proper place, which it was its duty to do. *Fourth*. By reason of the manner of the operation of the railroad, in not fastening the front car to the train nor to the cable. *Fifth*. That defendant had negligently failed to keep said switch in its proper position, and negligently allowed said switch to remain open at the time said train approached and ran into the same. Question is made in argument whether these are charges of negligence against the defendant directly, or of the coemployees of the deceased, and whether section 1307 of the Code applies to this case, so as to make the defendant liable to employees for the negligence of their coemployees. In the view we take of the case, it is unnecessary that we determine these questions.

Assuming that defendant is liable for all the acts of negligence charged, we inquire whether, under the evidence, the court erred in directing a verdict for the defendant. "Our conclusion is that, when a motion is made to direct a verdict, the trial judge should sustain the motion, when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict, if found in favor of the party upon

whom the burden of proof rests." *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. Rep. 235. The cause of this accident was that the cars ran in upon the empty track, instead of keeping upon the main track, as was intended, and as deceased, no doubt, expected. That this was caused by the switch being open, there is no doubt. The evidence shows that this kind of switch was in common use in that kind of tracks, and there is no evidence that it was not an approved appliance, or that it was defective or out of repair. True, one Calvert, in describing the switch, said: "It has been a common occurrence,—running off the track there; that is, they ran off frequently. That occurred by a negligence in shoving the switch,—that is, putting this lever on,—and they (night men) would leave it open." This does not show that the switch was an improper appliance, or out of order, but only that it had not been properly closed by the night men, in consequence of which passing cars ran in onto the empty track. The employment of the deceased required him to go on and along the track, which was a place of danger,—danger, the hazard of which he assumed in accepting his employment. There is no evidence that the defendant omitted any precaution, in arranging the place for deceased to work, that would have rendered his employment less dangerous. The switch being constructed to close itself after the passage of cars from the empty track onto the main track, thus leaving the main track open for the passage of cars thereon, there was no necessity for keeping a man at the switch to adjust and keep it in place. There is no evidence that the switch ever failed to open and close as intended, except when it was latched so as to prevent it from opening and closing. The fact that the car that ran upon deceased was not attached to the train or to the cable was not the cause of the accident, for it is shown that that car did not separate from the train; and it is evident that the accident would have occurred,

even though that car had been attached to both the train and the cable.

The evidence certainly does tend to show that the switch was open on the empty track because of having been left latched by the night men, and that it had been left thus, up to the time deceased was injured. This leads us to inquire whose duty it was to see that that switch was unlatched, and in position for the day's work. It will be noticed that, when unlatched, the switch was closed, as to the empty track; and, when cars were run across onto the main track, it closed itself, after their passage. All that was required to set it for the day's work was to unlatch it, so that it would open and close with the passage of cars from the empty track. William Calvert, who had charge of the day men, testified, as to the duties of deceased, that, "If there was any such thing as a latch, unlatched, why, he was the man, but if there was anything broke he reported it." He further states as follows: "At 7 o'clock in the morning Johnson started from the bottom of the shaft, to grease it. He would take his can of oil, and start at the bottom of the shaft, and go to the end of the tunnel, and grease along, and see that everything was all right;" and that if a switch was open he would shut it. Also, that Johnson oiled the rollers, and kept the road clean, and that it was Johnson's business to take care of and repair the rollers, and that no man was kept at any of the four switches. Mr. Roberts, foreman, testified to Johnson's business as follows: "He attended to the switches, always, and greased the switches as he passed along in the morning. There is a plate under the point of the switch that the point runs on. He greased it as he passed along. Nobody looked after them, unless he reported them to me, and I would send a man to repair them." In answer to the question, "whose business was it to see that the switch was closed in the morning?" Mr. Roberts answered,

"It was Mr. Johnson's;" and in response to the further question, "was it anybody else's business?" he answered, "No." Gus Larson stated in his testimony that "Johnson had nothing to do with the switches. When the car ran through the switch, it would spring back." On further examination he stated that he never saw any one hook the switch up, and did not know whose business it was to do so if it was open. The statement that Johnson had nothing to do with the switch is explained by the further statement that the switch adjusted itself when the cars ran through, and is, therefore, no contradiction of the testimony showing that it was Johnson's duty to look after the switches. This testimony is also based upon the further statement that the witness never saw anyone hook the switch up, and did not know whose business it was to do so if it was open. The evidence, we think, shows, without conflict, that it was the duty of Johnson to see that this switch was in position in the morning for the passage of the first train of loaded cars on the main track from the face of the mine to the shaft; therefore, that the negligence which directly caused his death was his own, in failing to put the switch in its proper position. The evidence shows that deceased was an experienced miner; had been employed in that mine for one year and a half, and was familiar with the kind of switch, the manner in which it operated, the kind of place furnished him in which to work. That no man was kept at the switch. That it was frequently left open on the empty track by the night men, and that loaded cars were frequently shoved to the shaft without being attached to the train or cable. Having remained in the employ of the defendant, with all this knowledge, he must be taken, under familiar rules of the law, to have accepted the hazards incident to such condition of things; he not having made any complaint thereof, nor asked any changes or alterations with respect thereto. We think there was no error in ordering a verdict for the defendant. **AFFIRMED.**

JOHN F. HAAS, Administrator, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant.

Death of Servant: Contributory Negligence. Though the rules of a railroad prohibit a work train from leaving a station without orders and provide that such orders must be shown to the fireman, the latter is not guilty of contributory negligence because he fails to object when the conductor orders such train out on the main tracks where it collides with a passenger train which the fireman knew to be due and which, as he probably knew, had not passed. Conceding that he should have known that the train had not passed, it would not be knowledge that his train ought not to start, if he did not know what information the conductor had received. (1)

Acts in Emergency. Where one fails to jump, though warned of an imminent collision, a charge that one confronted with sudden peril who does what he thinks safe is not negligent, though he act unwisely, is proper. (2)

Excessive Verdict: WHAT IS NOT. A verdict for eight thousand dollars for the death of an intelligent man of good habits, earning two dollars and twenty cents per day, and having an expectancy of forty years, will not be interfered with. (See *Looks v. Ry*, 46 Iowa, 115, and *Lowe v. Ry*, 56 N. W. Rep. 523.) (3)

Appeal from Scott District Court.—HON. P. B. WOLFE, Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION to recover damages to the estate of P. W. Davies, deceased, alleged to have resulted from negligence on the part of defendant which caused his death. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.—*Affirmed*.

John T. Fish, White & Murphy and Mills & Keeler for appellant.

Bills & Hass for appellee.

90	259
98	280
98	551
90	259
117	673
90	259
131	27
90	259
186	356
90	259
1140	339

ROBINSON, J.—The plaintiff is the administrator of the estate of P. W. Davies, who was killed on the twenty-first day of May, 1890, while in the employment of defendant as fireman of the locomotive engine of one of its construction or work trains. His train left Coon Rapids in the morning of that day, in charge of Conductor Lyman, under orders to work between the place named and Dedham. An hour or more before noon the train was run into Dedham, to clear the track for a freight train known as No. 11; and the conductor there received an order that the west-bound passenger train designated as No. 3 would be fifty-five minutes late. The work train was run out a few miles, and was again taken back to Dedham. The conductor and others of the trainmen, including Davies, then took dinner in Dedham, at a place which was located about two blocks from the main railway track. The men sat at the same table while the meal was being eaten, and, it is claimed, the fact that No. 3 was late was mentioned by some of them. After they had finished eating, the men returned to the railway; the engineer and fireman going to the engine, and the conductor and rear brakeman to the depot, to inquire about train No. 2. On being informed that it was late, the conductor ordered the brakeman who was with him to throw the switch for the main line, and gave the engineer the signal to go ahead. Before that time, No. 3, if only fifty-five minutes late, should have passed the station going westward, but it was then an hour and twenty minutes late, and had not reached it. The conductor had forgotten the train, and did not inquire for it of the operator, and it had also been forgotten by the rear brakeman. In obedience to the signal, the engineer moved the train onto the main line, and thence eastward. When about a quarter of a mile east of Dedham, the engineer discovered No. 3, within a short distance, approaching at the rate of about for-

ty-five miles an hour. He set the air brake, called to Davies to jump, struck him on the shoulder in passing, and jumped from the engine. Davies did not jump. There was a collision, and he was crushed between the tank and boilerhead of his engine, dying within half an hour.

I. It is not disputed that the conductor was negligent in not protecting his train against No. 3, but it is claimed that Davies should also have known that it had not passed the station, and that he was negligent in not calling the attention of his coemployees to that fact, and in going out on his engine, thereby contributing to the cause of his death. The rules of defendant in force, at the time of the accident, contained the following: "The safety of passengers and trains is of the first importance, and all operations of working and repairing the road must be subservient thereto." "(98) All special orders for the movement of trains must be addressed to the conductor and engineer, of which three copies shall be made. * * *" "(100) A train must not leave a station, when directed to run by special order, unless the conductor and engineer have a copy of the same in their possession." "(101) Conductors must in all cases show telegraphic orders pertaining to movement of trains to the rear brakeman, and, when practicable, to the forward brakeman. Engineers must in all cases show the same to the fireman, and when practicable, to the forward brakeman. Brakemen and firemen must report every instance when conductors and engineers fail to comply with this rule." The order in regard to train No. 3 was dated at Perry, was addressed to the conductor and engineer, and read as follows: "No three (3) will run fifty-five minutes late from Perry to Co. Bluffs." It was received by the conductor and engineer at 10:53 o'clock in the forenoon. The conductor read his copy of the order to the rear brakeman, the forward brakeman being ab-

sent, and Davies knew of it. The effect of the order was to permit the work train to use the track for fifty-five minutes immediately following the schedule time of No. 3, or, as stated by appellant, it gave the right to the work train to use fifty-five minutes of the schedule time of the passenger train, and no more. It is said that the work train moved only by special orders, and as an irregular train of an inferior class. It was required to keep out of the way of all regular passenger and other trains. The superintendent of the division of that part of the railway on which the accident occurred states that work trains are run wholly by special orders, and have no existence except as given by telegraphic order; but that was not true to the extent claimed. The general movements of work trains depended upon telegraphic orders, which directed the conductor and engineer where the train should be worked, and informed them in regard to other trains; but the manner in which the orders should be observed was necessarily left largely to the discretion of the conductor, and it was, ordinarily, the duty of the other trainmen to obey his orders.

If the claims now made by appellant are well founded, then it was the duty of the trainmen to refuse to obey the directions of the conductor until they had first satisfied themselves that the directions were authorized by the telegraphic orders; and when a discretion was lodged in the conductor it would have been their duty to refuse obedience unless they should approve his orders as within that discretion. It is scarcely necessary to say that such a rule would destroy the discipline essential to the proper management of trains, and we find nothing in the record which requires that it be enforced in this case. Whether Davies knew that No. 3 had not passed when the conductor ordered his train out onto the main line is not shown. It is probable, but not certain, that he would

have heard the train had it gone through the station while he was at dinner. But, conceding that he should have known that it had not yet arrived, it does not follow that he knew his train should not have been ordered out. He knew he had not seen a telegraphic order which announced any further change in the time of No. 3, it is true, but he did not know what information the conductor had received. It may be said that it was his right to see the order, if one had been received, and that until he saw it he should have acted on the presumption that none had been sent, but such a course on his part was not required by the rules. They provided that train and engine men should be held equally responsible for the violation of any of the rules governing the safety of the trains, and that they should take every precaution for the protection of trains, even if not provided for by the rules; but they also provided that the conductor should have charge and control of the train and of all persons employed on it, and made him responsible for its movements while on the road, "except when his directions conflict with the rules or involve risk or hazard," in either of which cases the engineer was to be held alike accountable. Brakemen and firemen were required to report every instance when the conductors and engineers should fail to show their telegraphic orders as provided by rule 101, but we find nothing in the rules which required them to disobey the orders given. The provision holding them equally responsible for the violation of the rules governing the safety of the train must be given a reasonable construction. It applied to each one within the range of his own duties, and did not make him responsible for the wrongful actions or omissions of others. It is said that Davies and all the other trainmen forgot all about No. 3. That is not shown by the evidence, although the rear brakeman testified to that effect; but it is evident that he had no

means of knowing the fact in regard to the engineer and fireman. The conductor and rear brakeman forgot it. The engineer remembered it, but, as the conductor had just come from the telegraph station when the signal to move was given, he concluded that the train had passed. It is not shown that Davies had forgotten it, nor is it shown that he knowingly went into a place of danger, and the jury may well have found that he was not negligent in remaining at his post.

II. The appellant complains of the fifth paragraph of the charge to the jury, which is as follows: "5 You are, however, in this connection, to remember that, when a person suddenly finds himself exposed to great peril and danger, and is obliged to act upon the spur of the moment, it is not necessarily negligence if, under such circumstances, he did what he thought was for the best for his own safety, although what he then did may not be the right thing, or what he would have done in cooler moments and when he was free from excitement." The ground of the complaint is that there is no evidence to justify it. It is said that the responsibility of Davies must be judged from what he did or failed to do when his train was ordered onto the main track, and that the instruction was not applicable to him as he was situated at that time. But it referred to his situation at the time of the collision. The engineer spoke to and struck him to warn him of the danger, and then jumped from the train, thus saving himself. Had Davies also jumped, he might have escaped injury; and the court correctly charged the jury in regard to his duty, and the weight to be given to his conduct under such circumstances.

III. The appellant contends that the amount of the verdict is excessive, and that the jury were not properly charged in regard to the measure of damages. We discover no error in the charge in that respect. The amount allowed was eight thousand dollars, and we

can not say it was excessive. The expectancy of life of the decedent was a little more than forty years, and his earnings were two dollars and twenty cents per day. He was of good habits, free from disease, and intelligent. The damages in such a case can not be determined accurately. There was evidence upon which to base the verdict rendered, and we do not think it should be disturbed. See *Locke v. Railway Co.*, 46 Iowa, 115; *Lowe v. Railway Co.*, 56 N. W. Rep. (Iowa) 523.

IV. What we have said disposes of the controlling questions in the case. Some objections are urged by appellant which we have not mentioned in detail, but we have examined them all, and conclude that the record does not disclose any error prejudicial to the defendant. The judgment of the district court is **AFFIRMED.**

H. J. GRISWOLD *et al.*, Appellants, v. ILLINOIS CENTRAL RAILWAY COMPANY.

ON REHEARING.

Contract Exempting from Liability for Negligence: VALIDITY OF SECTION 1289, CODE, CONSTRUED. A stipulation in a contract in which a railroad company permits a building to be erected on its right of way wherein business is to be done with the public, that the company shall not be liable for fire negligently communicated by it to such building, does not contravene public policy. (1)

LIABILITY OF COMMON CARRIER: CODE, 1308 CONSTRUED. Though said building is to be used for making shipments over defendant's road, and for purposes, ultimately, beneficial to it as a common carrier, said stipulation is not made in its capacity as a common carrier, and is not within the statutory provision prohibiting such carrier from exempting itself by contract from a liability which would exist without such contract. (2)

PUBLIC NOT INTERESTED IN SUCH CONTRACT. Though the contract was that business in said building should be conducted so that the public should not be prejudiced, the public has no such interest in who shall bear the loss if the building be destroyed by fire, as to render

90	265
111	510
90	265
114	423
90	265
119	32

said stipulation of exemption void as against public policy. (2) ROBINSON and KINNE, JJ., *dissenting*, 53 N. W. Rep. 295; s. c., reversed on this rehearing.

Appeal from Buchanan District Court.—HON. J. L. HUSTED, Judge.

SATURDAY, FEBRUARY 3, 1894.

ACTION to recover damages for the loss of an elevator by fire, alleged to have been caused by negligence on the part of defendant. A demurrer to the answer was overruled. The plaintiffs electing to stand on their demurrer, judgment was rendered against them for costs and they appeal.—*Affirmed*.

R. W. Barger and *E. E. Hasner* for appellants.

W. J. Knight for appellee.

GIVEN, J.—A rehearing was granted in this case, and it is again submitted with further arguments. The facts disclosed by the pleadings, which are material to be considered, are sufficiently stated in the former opinion (53 N. W. Rep. 295), and are as follows: "On the thirtieth day of April, 1890, the plaintiff Griswold owned a two and one half story elevator building, warehouse and corncrib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named, the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the

value of six thousand dollars, and was, at the time, insured by the plaintiffs the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company in the sum of one thousand dollars each, or for the aggregate amount of four thousand dollars. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and, claiming that by reason of such payments they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood, by virtue of a lease to him from defendant, which contained the following provisions: 'And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good, substantial elevator, coal sheds, and lumber yard on the above described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which, in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad. And the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt

and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid.' The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question. The ground of the demurrer is as follows: 'The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employees. The plaintiffs, therefore, say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employees and servants; and that said defense, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void.' No special claims are made in behalf of the insurance companies; therefore, their interests and that of Griswold, for the purposes of this appeal, will be treated as governed by the same rules."

I. It will be seen, from the statement of the case, that the controlling question is whether that clause in the lease whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently communicated to the property on the leased premises in the operation of the railroad is void, as against public policy. The right to so contract as to fire accidentally communicated is not questioned, but only the right to so contract as to fire negligently communicated. Public policy is variable,—the very reverse of that which is the policy of the

public at one time may become public policy at another; hence, no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void, as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society. Public policy has been aptly described as "an unruly horse, and, when once you get astride, you never know where it will carry you." It was said by WILMOT, C. J.: "It is the duty of all courts to keep their eyes steadily upon the interests of the public, even in the determination of commutative justice, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance in *foro civili*." Other courts have said: "We may take it as well settled that in the law of contracts the first purpose of the courts is to look to the welfare of the public, and, if the enforcement of the agreement would be inimical to its interest, no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement. The common law will not permit individuals to oblige themselves by a contract either to do, or not to do, anything, when the thing to be done or omitted is in any degree clearly injurious to the public." Again, it is said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract." 3 Am. and

Eng. Encyclopedia of Law, p. 875, note 3; *Boardman v. Thompson*, 25 Iowa, 501. Aided by these definitions and cautions, we proceed again to inquire whether the clause of the agreement in question, if carried into effect, would be injurious to any interest of the public, or, in other words, whether the public has any interest in this provision of the contract. The conclusion of the former opinion is "that the provision, if effectual, would cause the defendant to disregard and neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law." This conclusion rests, in part at least, upon holding that sections 1289 and 1308 of the Code are applicable to the question under consideration, and that the defendant owed it as a duty to the public to operate its road with care with respect to plaintiff's property. The discussion on rehearing leads us to inquire whether, under the law and facts, it is correct to say that the defendant owed any duty to the public with respect to the plaintiff's property. The former opinion holds correctly that the liability of railroad corporations, under section 1289, for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff. The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to property situated on the premises of its owner, where he has the right to have it, and hence the provision of section 1289

making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not upon his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission.

In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents, and employees, and that these might be negligent in the performance of their duties. The plaintiff had an insurable interest, and could, as he did, protect himself, in part at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. Plaintiff Griswold contracted with his coplaintiffs, the insurance companies, for indemnity against loss by fire, whether caused by accident or negligence. The fire occurred through neglect, and the insurance companies, as they were bound to do, paid the insurance. Those contracts, like this, were for indemnity against liability by fire, whether caused by accident or negligence. Many losses by fire occur through the negligence of the insured or his family, and recovery is had, unless the negligence was willful. While these policies are not before us, we may assume, we think, that, under them,

the plaintiff Griswold would have been entitled to recover, even though the loss had occurred through his own negligence, unless it was willful. The public had no interest in these contracts of insurance between the plaintiffs; nor were they against public policy, because the companies agreed to indemnify the assured against loss caused by his own negligence. This is not a question whether, under section 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that, as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the defendant acquired this right of way in the exercise of the right of eminent domain did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location.

II. It is contended that the defendant entered into this contract in its capacity as a common carrier, and therefore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property can not exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a

common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses, or elsewhere, apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable. *Johnson's Adm'x v. Railway Co.*, 11 S. E. Rep. (Va.) 829, and other cases involving contracts of exemption from liability for causing injuries to, or death of, persons, are not applicable. The public has an interest in the life and safety of every human being, and every such contract is clearly injurious to public interest, but not always so as to property.

III. In the lease the plaintiff Griswold agrees "that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." While it is evident the parties contemplated a place for dealing with the public, in the maintenance and management of which the public might be interested, neither that interest nor Mr. Griswold's agreement gave the public any interest as to who should bear the hazard of the loss of the buildings by fire. The plaintiff indemnified himself against the loss, in part at least, by insurance, and the insurance companies have paid him, as they were bound to do. Surely, public policy does not demand that the defendant shall now reimburse these insurance companies for the payments they were bound to make by

their own contract, and which the defendant has never promised to repay. As to the claim of the plaintiff Griswold to recover the excess of the loss over the amount of insurance, public policy answers, You must stand by your contract. After a careful review of the case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the district court should be affirmed.

ROBINSON, J. (*dissenting*).—I can not assent to the conclusions of the foregoing opinion that the agreement in question was effectual to relieve the defendant of liability for negligently setting fire to and destroying the property of the plaintiff. Something has been said on rehearing in regard to the liability of the defendant to the insurance companies and their right to recover; but as no question in regard to such liability and right of recovery, as distinguished from the liability of defendant to Griswold for the loss he sustained, for which he has not been compensated, is presented by the pleadings, or was argued on the first submission of the cause, it should not, as it seems to me, be given weight now. It is well settled that, in a civil case, a party can not, on rehearing, make a case different from that presented on the original submission. *McDermott v. R'y Co.*, 85 Iowa, 180, 52 N. W. Rep. 185, and cases therein cited. It follows that the only questions which we should now consider are those involved in determining the character and effect of the provisions of the case in question, and the right of Griswold to recover, without regard to the interests of the insurance companies. On the rehearing we have been favored with elaborate arguments by representatives of several of the leading railway corporations doing business in the state, and, in explanation, it is said that the questions involved are of interest to all railway companies in the

state, and that the former opinion, if adhered to, will seriously affect their management and business. It is probably fair to presume that leases with provisions similar to the one in controversy are now, or soon will be, in general use in the state, and that the questions involved are of interest to the large number of persons who are now, or shall hereafter be, concerned in buildings and property located on land owned by railway corporations by virtue of leases from the corporations. The importance of the questions to the railways and to people doing business with them is apparent. It does not seem to me that the authorities cited in the opinion of the majority justify the conclusions they reach. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. * * *" It was said in *West v. R'y Co.*, 77 Iowa, 654, 35 N. W. Rep. 479, and 42 N. W. Rep. 512, that this statute imposes an absolute liability upon railway corporations without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes without fault on its part is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway. Section 1308 of the Code provides, in effect, that a common carrier, or carrier of passengers, can not exempt itself from liability, as such carrier, by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of stat-

utory regulations, that railway companies can not restrict their liability for negligence in transporting passengers or freight by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in Cooley on Torts (page 687), with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned, because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct." In *Johnson's Adm'x v. R'y Co.*, 11 S. E. Rep. (Va.) 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarry men, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to, or death of, any of the members of the said firm, or of any of its agents or employees, sustained from said work, should such death or injury occur from any cause whatsoever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the

contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against the public policy are void. Nothing is better settled—certainly in this court—than that a common carrier can not, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are *quasi* public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and can not be enforced. *Railway Co. v. Ryan*, 11 Kan. 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. *Thomas v. Railway Co.*, 101 U. S. 71. Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the diligence and care with which it furnishes and operates its road is, to that extent, against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the considera-

tion which induced it to enter into the agreement. Elevators, coal sheds and lumber yards are important aids to a railway engaged in carrying grain, coal and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt important and controlling considerations which induced it to execute the lease. Those improvements were not only of value to the defendant, but they were important to all who bought or sold or stored commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in its subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed, at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." It is true that a contract is not void, as against public policy, unless it is injurious to the interests of the public, or tends to have that effect, or contravenes some established interest of society. But, when a contract belongs to one of those classes, it will be declared void, although, in a particular instance, no injury to the public may result.

5 Lawson, Rights, Rem. & Pr., section 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, is termed a 'contract against public policy' (or sound policy) is likewise void." Bish. Cont., section 473. To justify the conclusion that the provision under consideration is void, it is only necessary to find that the provision, if effectual, would cause, or tend to cause, the defendant to disregard or neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, does not appear to me to be doubtful. It was not intended merely to require Griswold to bear the loss which should result from the hazards to which his property should be exposed by operating the railway with reasonable prudence and care, but it was intended to exempt the defendant from all liability for damages from fire which should be caused in operating its railway without regard to acts of negligence, or lack of precaution and care on its part, which should contribute to the loss. The agreement sought to exempt the defendant from liability for negligence, whatever its nature, which should be involved in the management of its railway.

Such negligence might be manifested in many ways—as, in the use of insufficient or defective machinery, in the employment of careless or incompetent train men, or in having an insufficient number of trainmen,—and was necessarily of a kind to affect the business of defendant as a common carrier. The tendency of the agreement was to make the defendant less diligent, in keeping its locomotive engines in good order, in adopting improvements to prevent the escape of fire, and in selecting its employees, than it would otherwise have been, and thus to expose, not only the property of Griswold, but all other property of a com-

bustible kind located upon its grounds, to dangers which reasonable care on its part would have prevented. The tendency of the agreement is more clearly seen when the probable aggregate effect of such agreements, entered into between defendant and all the tenants on its right of way and depot grounds in the state, is considered. To keep in good order the machinery and appurtenances of a railway, and to operate it in the manner which reasonable prudence demands, involves the expenditure of large sums of money, and the constant exercise of skill and care by railroad employees. Whatever tends to lessen the degree of care used in operating a railway is to that extent inimical to public interest, and contrary to public policy. Combustible property on the depot and right of way grounds of a railway company is of necessity more exposed to danger from fire caused by operating the railway than property outside of their limits; and if it can, by agreement, protect itself against liability for negligently destroying the property on its grounds, the common experience of mankind, as applied to other matters, teaches us that the natural effect of such an agreement is to lessen the care and diligence the railway company will use to prevent such negligence and the consequent loss. It follows that each tenant is interested in the agreement of every other tenant on the same line or division of railway, and that the people who store property in the buildings of such tenants, or who are concerned in grain, coal, lumber, and other articles which are received in, or delivered from, such buildings, are also interested in the agreements.

It does not seem to me that the law which governs ordinary contracts of insurance is applicable to this case. In such contracts the property owner is never, in terms, insured against the consequences of his own negligence. On the contrary, great care is taken to

guard against and prevent negligence on his part. Insurance to the full value of the property is not given, and all inducement to negligence on his part is withheld. If loss result from his negligence, as a rule, he and the insurance company, only, are affected, his negligence not being of a character to affect the public. I am not aware that an agreement to insure a person against the consequences of his own negligence, the natural and probable effect of which would be to encourage such negligence to the danger and prejudice of others, is sustained by the courts. It is true that the public has no interest in the damages in controversy in this action, but it had an interest in the agreement in question so far as it tended to induce negligence on the part of defendant in operating its railway; and as negligence of that kind was the natural and probable effect of the agreement and as the agreement is not separable, it would seem to follow that it should be held void. This conclusion is not only in entire harmony with the authorities cited in the opinion of the majority, but, as it seems to me, is required by them, as well as by the authorities cited in this dissent.

Whether the defendant owed to the public any duty in regard to its own buildings, whether the defendant had any insurable interest in the property of Griswold which was destroyed, and whether the insurance companies are entitled to recover the amounts they have paid to Griswold, are questions which do not appear to me to be so presented as to make it proper for us to determine them on this appeal, and in regard to them I express no opinion.

KINNE, J., concurs in the dissenting opinion.

EMILY BARNES, Appellant, v. MARY E. BARNES *et al.*

Marriage: Presumption of Divorce. Where the records of the counties in which a man and wife have lived show no divorce, divorce is not presumed for the woman because both marry again, there being no proof that the husband ever lived with the second wife. (2)

SAME. Where the evidence tends to show that the wife's second marriage was in bad faith and her second husband abandoned by her, there is no presumption that she was legally married to the second after the death of the first husband. (3) *Blanchard v. Lambert*, 43 Iowa, 228, and *Ellis v. Ellis*, 58 Iowa, 720, distinguished; *Gilman v. Sheets*, 78 Iowa, 500, followed.

Appeal from Blackhawk District Court.—HON. D. J. LENEHAN, Judge.

SATURDAY, FEBRUARY 3, 1894.

ACTION in equity for a partition of certain real estate of which Ezra Barnes died seised. The plaintiff claims to be the widow of said deceased, and, as such, entitled to a distributive share in said real estate. The defendant, Mary E. Barnes, claims to be the widow of said deceased, and to be entitled to all of said real estate, under the last will and testament of said Ezra Barnes, deceased. Decree was entered dismissing plaintiff's petition, and for costs, from which she appeals.—*Affirmed.*

Boies, Couch & Boies for appellant.

O. C. Miller and Mullan & Pickett for appellees.

GIVEN, J.—I. The contention is not as to which of these parties is the widow of Ezra Barnes, deceased, but whether the plaintiff is his widow. The defendant is entitled to take under the will, though she be not the widow of Ezra Barnes; but, if the plaintiff is such

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widow, then the defendant takes under the will, subject to plaintiff's right to a distributive share. Our single inquiry, then, is whether or not the plaintiff is the widow of Ezra Barnes. To be such widow, she must have been his lawful wife at the time of his death. The contention as to the plaintiff's rights rests upon the following facts, fully established by the evidence: On October 5, 1854, the plaintiff, then Emily Bruce, was married to John Weidman, at Monroe, Green county, Wisconsin. At the time of this marriage, they were both residents of Stevenson county, Illinois, to which they returned. From there they went to Ogle county, where they continued to live together as husband and wife for about two years after their marriage. For some cause that does not appear, they then separated, and never after lived together. After their separation, plaintiff came with her parents to Iowa, and soon thereafter Weidman went to Sauk county, Wisconsin, where he continued to reside until April, 1861, when he enlisted in the army. Plaintiff filed her petition in the district court of Benton county, Iowa, asking a divorce from Weidman, on the ground of desertion, in which case the following entry was made: "Now, to wit, October 22, 1858, comes the plaintiff, and files proof of publication, and, upon the suggestion of the death of John Weidman, said plaintiff moves the court to dismiss said cause, which is accordingly done, at plaintiff's costs." John Weidman was killed in battle, September 14, 1862. In September, 1858, the plaintiff and deceased, Ezra Barnes, were married, in Benton county, Iowa, and thereafter lived together and treated each other as husband and wife until 1869 or 1870, when a difference arose between them, and they separated, the plaintiff going to Missouri, and they ever after lived apart. In 1869 a child was born to plaintiff. In 1859 or 1860, John Weidman and Belle Coplin were married in Wisconsin, but it does not appear

whether they afterwards lived together as husband and wife or not. It further appears that on January 2, 1870, the defendant, Mary E. Barnes, then Mary E. Livingston, was married to the deceased, Ezra Barnes, at Blackhawk county, Iowa, and that they lived together as husband and wife, and treated and recognized each other as such, up to the death of Ezra Barnes, July 1, 1890. Ezra Barnes left a will, which has been duly probated, devising all his property, both real and personal, to the defendant, Mary E. Barnes. It is shown in evidence in what counties the plaintiff and John Weidman resided after their marriage, and that no record of any divorce dissolving said marriage was found in the proper records of either of said counties.

II. It is entirely clear that, unless plaintiff's marriage to Weidman had been dissolved before her marriage to Barnes, the latter marriage was illegal, and, if so, that she was not the lawful wife of Barnes, and consequently not his widow, by virtue of that marriage. Plaintiff does not produce any evidence of a divorce having been granted dissolving her marriage with Weidman, nor is it claimed that Weidman was dead at the time of her marriage to Barnes. Plaintiff's first contention is that under the authority of *Blanchard v. Lambert*, 43 Iowa, 228, the law will presume a divorce dissolving the marital relation between plaintiff and Weidman prior to plaintiff's marriage with deceased, from the fact that both she and Weidman thereafter married. In that case the plaintiff and her former husband, Musgrave, separated in 1858, and the plaintiff married Blanchard nearly nine years thereafter. For several years prior, Musgrave was living with a woman who claimed and whom he claimed to be, and who was reputed to be, his wife. The plaintiff lived near by, and knew these facts. Upon these facts, the court says: "The law presumes that this cohabitation of Musgrave was legal, and not criminal, and that he had

obtained a divorce from plaintiff." The facts upon which that presumption was based are quite different from the facts in this case. In that, Musgrave had lived with and recognized the second woman as his wife, to the knowledge of the plaintiff, before her marriage to Blanchard; in this, the plaintiff's husband, Weidman, did not marry Belle Coplin until after plaintiff's marriage to Barnes, and it is not shown that he ever lived with Belle Coplin, or recognized her as his wife, or that this plaintiff ever knew of that marriage during the time she lived with Barnes. There was no evidence whatever in that case to negative the presumption that Musgrave had obtained a divorce, while in this it is shown by the records of each county in which Weidman and the plaintiff had resided that no divorce had been obtained therein. This evidence is not conclusive, as it is possible that a divorce might have been obtained elsewhere, but it is certainly sufficient to rebut the presumption that a divorce had been granted, and especially when that presumption has no better foundation than the facts in this case. *Ellis v. Ellis*, 58 Iowa, 720, 13 N. W. Rep. 65, is also cited.

In that case the plaintiff and Myron Ellis were duly married, and lived together as husband and wife. Without any known cause, other than a desire to change their places of residence, they separated, he coming from Canada to this country. They never after lived together, but from time to time she received letters from Myron Ellis, the last being in September, 1868, in which he inclosed her fifty dollars. In his letters he treated the marital relation as existing between them. In 1871, Myron Ellis married Jennie Meader, with whom he lived as his wife until her death, and in 1878 married the defendant, with whom he lived as his wife until his death, in 1880. This court, distinguishing the facts from those in *Blanchard v. Lambert*, *supra*, held the plaintiff to be the widow of

Myron Ellis. The court says: "We are not prepared to say, under the circumstances, that a presumption should be indulged that Myron Ellis had procured a divorce, and thus invalidate the first marriage. It seems to us there must be some fact upon which the presumption can be legitimately found. * * * Now, the only thing or act done by Ellis or the plaintiff upon which it can be claimed there should be a presumption a divorce had been obtained is the subsequent marriage of Ellis. We feel constrained to say this is not sufficient, and the court erred in holding the defendant was the widow of Myron Ellis, and the court should have held that plaintiff was such widow." Applying this reasoning to the case in hand, we should not presume that John Weidman had obtained a divorce simply from the fact of his marriage to Belle Coplin. *Gilman v. Sheets*, 78 Iowa, 500, 43 N. W. Rep. 299, a case somewhat similar to this, held that a divorce would not be presumed under its facts. We are clearly of the opinion that any presumption that might arise under the other facts of this case is fully rebutted by the evidence that no divorce was granted between Weidman and the plaintiff in any of the counties in which they resided.

III. Plaintiff, again relying upon *Blanchard v. Lambert*, *supra*, contends that "when a contract of marriage entered into in good faith is void in its inception, by reason of the existence of some legal impediment to marriage, which legal impediment is thereafter removed, and the parties, subsequent to that time, continue to cohabit, the law will presume a marriage upon the removal of such legal impediment, provided such cohabitation was so continued where a marriage might have been consummated under the common law rule." It is conceded that there are some authorities holding that a presumption of marriage will not be indulged from cohabitation, though continued when all impediments to marriage are removed, if the parties

are shown in the beginning to have chosen unlawful and illicit relations with each other, instead of lawful marriage. We must again notice the marked distinction that exists between this and the cited case. In that, Musgrave died in June, 1871. The plaintiff and Blanchard, to whom she had been previously married, and with whom she had lived as a wife, continued to live together as husband and wife until Blanchard's death, in 1872. "During this time, Blanchard introduced the plaintiff as his wife. He called her 'ma' when speaking to one of the family, and, when speaking to strangers, he called her his wife. They lived happily together, and treated each other with mutual respect. During the last illness of deceased, which lasted about ten months, the plaintiff sat up with and waited on him, and in all respects treated him as a lady would her husband. She was treated in the community with respect, and was recognized as the wife of deceased. Blanchard made a will, in which he mentions plaintiff as his wife, and bequeaths to her the homestead." "Under these circumstances," says the court, "even if the marriage were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Musgrave." In that case the plaintiff and Blanchard were married in good faith, under the warranted presumption that Musgrave had procured a divorce, and, in the helpful and happy relations mentioned, continued to live together as husband and wife up to the death of Mr. Blanchard. In this case it may well be questioned whether plaintiff's marriage to Barnes was in good faith. She knew of her former marriage, and, so far as appears, had no reason to believe that her husband was either dead or divorced. Her suggestion of his death as a reason for dismissing her petition for divorce was not warranted by the facts, for Weidman was then living, nor does plaintiff show any

reason for then representing him as dead. We are inclined to think that the proceeding was to get the suggestion on record as a kind of justification to plaintiff to marry again. Unlike Mrs. Blanchard, this plaintiff did not continue to live in peaceful, happy, and helpful relations with Barnes until his death, but, on the contrary, years before, left him, and went to another state to reside, not knowing, or caring to know, so far as appears, anything further about him. There is evidence as to the cause of their separation, but its admissibility is questioned, and we do not, therefore, consider it. We are strongly inclined to the belief that plaintiff's marriage to Barnes was not in good faith; that their relations were unlawful and illicit, and therefore a subsequent marriage after the death of Weidman can not be presumed. It is surely not the purpose of the law to sanction the cohabitation of those who go together under the forms of marriage, knowing that they are legally disqualified, by presuming a legal marriage from continued cohabitation after the removal of the impediment to their legal marriage. Our conclusion is that the decree of the district court should be **AFFIRMED**.

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**THE AULTMAN & TAYLOR COMPANY, Appellant, v. E.
H. and SARAH SHELTON.**

Warranty in Sale of Machine: MEASURE OF DAMAGES ON BREACH.

Where it is agreed that known defects in a machine shall be remedied to correspond to a warranty, and it is not done nor shown that it could be done, the damage is the difference between the actual value of the machine when sold and its value as warranted. (6)

DEFENSE TO BREACH. It is no defense that warrantee could have remedied the defects had he known how. (7)

SAME. Knowledge of the defects and failure to object to them, are not defenses to the breach of a warranty to remedy such defects. (4)

Oral Warranty, What is. Where the oral agreement is that a warranty shall be the same as contained in a certain written contract, said oral agreement is an oral warranty. (5)

Substitution of Warranty. Where a partnership is limited to running a threshing machine, bought by the members as individuals, a warranty taken by one of them after the purchase, differing from one given at the time of the purchase, does not bind the other members. (4)

Attorney Fee in Chattel Mortgage. If a provision in a chattel mortgage that mortgagor will pay for an attorney's services, "in removal and sale" of the mortgaged property be binding at all, such services are not measured by the attorney fee statute, but by their reasonable value. (9)

"Negotiable Without Offset," Construed. The words, "negotiable without offset," do not prohibit offsets against the original payee. (2)

Practice: Permitting Amendments. It is not error to permit amendments to pleadings, during trial, if an opportunity be given the other party to apply for a continuance, and it be not done. (1)

SAME: INTERROGATORIES. It is not error to refuse interrogatories which do not call for ultimate facts, and which would simply tend to confuse the jury. (8)

SAME: ON APPEAL. A motion to strike and to tax costs of an amendment to abstract for being filed late will be denied where the amendment was justified by appellant's abstract, and where the delay is not prejudicial. (10)

Appeal from Clay District Court.—HON. LOT THOMAS, Judge.

SATURDAY, FEBRUARY 3, 1894.

THIS action is upon two promissory notes, aggregating one thousand, three hundred and fifty-five dollars, upon which there is a conceded credit of six hundred and seventy-three dollars and fifty-three cents. The answer disputes the correctness of two of the items of credit given, and claims additional credits, as to which issue is taken. The consideration for the notes in suit was a threshing machine outfit, consisting of a separator and steam engine. The answer, by way of counterclaim, avers a warranty of the outfit and a breach

thereof, and asks damages in the sum of six hundred dollars. Upon issue formed, the cause was tried to a jury, that returned a general verdict for the defendants. The record presents numerous questions for consideration, and the particular facts as to each will be better understood if presented in connection with its consideration. The plaintiff appeals.—*Affirmed*.

Cory & Bemis for appellant.

Parker & Richardson for appellees.

GRANGER, C. J.—I. This cause was placed on the docket of the district court in April, 1889, and came on for trial on the fifteenth of February, 1892. On the day following, the court permitted the defendants to file a substituted answer for one count of the answer, filed February 15, 1892, which, it appears, was also a substituted answer. Complaint is made of the action of the court in permitting it to be filed. The answer thus filed pleaded additional payments in the sum of five hundred and forty-five dollars. The court, in permitting it to be filed, gave to plaintiff an opportunity to make a showing for a continuance if taken by surprise by the filing of the pleading. We assume that upon a showing that made it doubtful, even, whether plaintiff was able to properly proceed to trial, a continuance would have been granted. No showing was made or attempted, and it is fair to assume that no reasons existed for a continuance. The matter was clearly within the court's discretion.

II. The following is a copy of one of the notes in suit: "On or before the first day of December, 1887, for value received, we, or either of us, of Spencer post office, county of Clay, state of Iowa, promise to pay to the Aultman & Taylor Company, or order, seven hundred dollars, and negotiable without offset at Clay County Bank, of Spencer, Iowa, with interest at eight

per cent. per annum from date until paid." It is contended that the words in the note, "and negotiable without offset," is a contract to pay without offset, and that all evidence to support one was improperly admitted. We do not think that the note has such a legal significance. The provision has not reference to the original parties to the note, but to parties to whom it may be negotiated. The provision only purports to fix terms of negotiation.

III. On the third day of the trial the plaintiff asked leave to amend the sixth count of its reply by alleging that on December 31, A. D. 1886, the defendants had full and complete knowledge of the condition of the separator in question, and that during the year 1887 they used and operated it, and at no time, either before or after December 31, A. D. 1886, offered to return said machine, and on December 31, A. D. 1886, the defendants had full knowledge of said machine's condition and defects, and with that knowledge received and operated the same all of 1887 without objections, which the court refused. The proposed amendment purports to set out only defensive matter to that pleaded in a counterclaim. It was not a count of the reply by itself, but was pleaded in connection with other matters. The facts stated in the amendment, if true, did not avoid, nor were they a defense to, the counterclaim pleaded. It seems to us that the court wisely exercised its discretion in not permitting it to go upon the files.

IV. The district court presented to the jury the issues on defendant's counterclaim, as follows: "It further appears, without controversy, that in June or July, 1886, the defendant E. H. Shelton and one Tenaure purchased from the plaintiff a threshing machine outfit, consisting of a separator and steam engine, for which they executed and delivered to the plaintiff their promissory notes, and that, upon said purchase by said parties, the plaintiff gave to said purchasers a warranty

containing, among other things, the following stipulations and agreements: 'That with good management said machine was capable of doing a good business in threshing and cleaning grain, and is superior to any endless-apron thresher manufactured in the United States, in its adaptation for separating and saving from the straw the various kinds and conditions of grain and seeds, with less waste, less littering, and less detention from wet or bad condition of straw or bad weather, conditioned that, upon starting the machine, the purchasers should intelligently follow the printed hints, rules and directions of the manufacturer; and, if, by so doing, they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be given by the purchasers to the dealers through whom purchased, and also to the Aultman & Taylor Company, Mansfield, Ohio, by registered letter, and reasonable time allowed to get to and remedy the defect.'

" 'It further appears, without controversy, that afterward, and about December 31, 1886, said Tenaure transferred his interest in said machine and engine to the defendant, O. P. Barber, and that at that time, under a mutual agreement between the plaintiff, Tenaure, and the defendants, Barber and Shelton, the original notes given on the original purchase of the machine by Shelton and Tenaure were taken up, and Tenaure was released from all obligation on said notes, and transferred his interest in the threshing machine and engine to the defendant Barber; and, instead of the former notes, the notes in suit were executed and delivered to the plaintiff by the defendants, Shelton and Barber. It further appears from the evidence, without controversy, that after the original purchase of said machine by Shelton and Tenaure they took possession of the same, and proceeded to use the same during the threshing season of 1886; but these defend-

ants claim that said machine was not a good machine, or not equal to or superior to any endless-apron machine; that it would not separate well, or properly separate, the grain from the straw, as warranted, and would not clean the grain properly; and that said machine was poorly constructed; and that said thrasher, in said condition, was of the actual value of not to exceed one hundred dollars, and that, if it had been as warranted, it would have been of the actual value of six hundred dollars. These defendants further say that subsequently, and at the time the notes in suit were executed, the defendant, Barber, was desirous of buying out the interest of said Tenaure in and to said property, and that the plaintiff and the defendants Shelton and Barber, entered into an oral agreement wherein the plaintiff was to still warrant said machine as to quality, character, and construction, the same as the written warranty hereinbefore set out; and that the said plaintiff orally promised and agreed that if the defendants would keep the machine, and execute the notes in suit, the plaintiff would, before the next threshing season, or during the threshing season, repair said machine, and make it operate and come up to the terms of said warranty without any further notice or trouble; and that thereupon the defendants and the said Barber executed and delivered to plaintiff the notes sued upon. The defendants further say that said machine remained in said condition until the next threshing season, and that the plaintiff wholly neglected and refused to repair the same, and wholly neglected and refused to make the machine come up to the terms of the said warranty in respect to the terms hereinbefore stated, but that said machine still continued to work as it had previously done, and was still defective in all respects, as hereinbefore set forth; and that said machine was not worth to exceed the sum of one hundred dollars, and that it would have been worth

six hundred dollars if it had been as warranted. These defendants therefore say that they have been damaged in the sum of six hundred dollars, which amount, they say, should be offset against the notes sued upon. On the other hand, it is the contention of the plaintiff that at the time of the execution of the notes in controversy by the defendants, Shelton and Barber, in December, 1886, it was not agreed that the old warranty should be continued in force, or that the machine should be made to fulfill the terms of the old warranty, but that at the time, and as a part of the consideration for the new notes, the plaintiff executed and delivered to the defendants, Barber and Shelton, a written warranty, in the following language:

“ ‘Whereas O. P. Barber and E. H. Shelton have this day executed to the Aultman & Taylor Company their three notes, in aggregate one thousand, six hundred and fifty-five dollars; and whereas, said parties claim said machine does not work or operate properly: Now, it is agreed, if said party pay said indebtedness promptly, said company are to make the machine work satisfactorily, and during fall of 1887, if said parties wire and give said company written notice three weeks prior to date of threshing, then said company to have an expert on hand to assist in operating said machine; if said debtors are at fault in operating the same, the expenses of said expert to be paid by said debtors.

“ ‘THE AULTMAN & TAYLOR COMPANY.’

“And the plaintiff says that the defendants have failed to pay and settle said notes sued on, and have failed to give the plaintiff written notice of the failure of the said machine to operate properly, three weeks prior to the date of beginning threshing during the fall of 1887; that the defendants used said threshing rig all the year of 1887 without objection, and in no manner notified the plaintiff, either orally or in writing, that it did not give satisfaction.” The jury specially

found that the written warranty claimed by plaintiff as having been made to Shelton & Barber was not made and delivered. This finding was under the issue formed as to whether Shelton & Barber took the machine under the written warranty, or an oral one keeping in force the original one with certain modifications.

It is true that at some time the written warranty claimed by plaintiff was delivered to Barber, who was a member of the firm. The court, under proper instructions, directed the jury to find whether or not such delivery was to the firm. The rule adopted by the court was that, if it was made the contract when the notes were given, or was afterward delivered to Barber by virtue of an understanding at the time the notes were made, it became the contract, but that if, after the contract was completed by an oral agreement to retain the former warranty modified, and the warranty claimed by plaintiff was afterward delivered to Barber without the assent of Shelton, it was not the contract of the parties. Nothing in the partnership relation of Shelton & Barber authorized one partner to make such a change in the contract of purchase and bind the other. There is nothing in the transaction to bring it within the rule stated in *Parsons on Partnership* [2 Ed.], section 103 or 219. The signatures to the note do not appear in the record, but we understand that the giving of the notes was not as a partnership, but that each maker signed in his individual capacity. The partnership transactions were merely as to the running of the machine. Our conclusion on this branch of the case will render it unnecessary to consider many questions as to the introduction of evidence, because they are based on the theory of the written warranty being the contract of the parties.

V. The warranty relied on by defendants is, with certain exceptions, one made in writing between plain-

tiff and Shelton & Tenaure when the outfit was purchased. By the change in the transaction, by which Tenaure was dropped from the firm, and another formed with Barber as a member, the written warranty became inoperative, and the first notes were surrendered. Defendants now aver that, by an oral agreement, the terms of that written warranty, with certain exceptions, became the contract of warranty as to Shelton & Barber, and the averments of the counterclaim are upon the warranty as an oral one. Appellant urges that if, with the exceptions specified, the terms of the written warranty were continued, the contract of warranty was in writing, and no recovery can be had on averments of an oral warranty. Legally speaking, the contract upon which defendants rely is an oral one. They made no written contract of warranty. They agreed upon the terms expressed in a writing as the terms of their oral agreement. There was no agreement to accept the instrument as their contract, but a mere adoption of its terms. The language of the averment is that "E. H. Shelton and Barber made an oral agreement by which plaintiff was to still warrant the machine as contained in the above written warranty, except," etc.; that is, the terms as expressed in the written warranty were to become the terms as between the new parties. As was said in evidence: "They would make it come up to the warranty;" referring to the warranty previously made. The evidence supports the finding by the jury that the oral contract was made as alleged.

VI. The court gave the general rule as to measure of damage on a breach of warranty in the sale of personal property,—that it was the difference between the actual value of the article when sold and its value as warranted. It is urged that the case is an exception to the rule, and that the rule to be applied is the cost of making the necessary repairs to the separator. We think not. Under the sale to Shelton & Barber, plain-

tiff undertook specifically to make good known defects in the machine,—to make it come up to the warranty. This it failed to do, and the failure constitutes a breach of its warranty. It does not appear that it could be made to conform to the warranty. The conclusion is, rather, that it could not be. The rule of damage given by the court is the proper one.

VII. Plaintiff attempted to show that the defects in the machine could have been remedied by defendants if they had known how, and the evidence was excluded, and we think properly so. As has been said, the machine was sold to Shelton & Barber with the understanding that it was defective, and the defects were to be remedied by plaintiff. The fact is not only shown by the oral evidence, but it appears from the written warranty that plaintiff seeks to establish as the contract that the defects then existed, and were the subject of the contract. With the contract as found by the jury, it was entirely immaterial whether or not the defects could have been remedied by defendants had they known how.

VIII. Appellant asked the court to submit some thirty-eight interrogatories to the jury, which the court refused, and the action of the court is assigned as error. The questions can not be set out. They are not questions calling for findings of ultimate facts or conclusions, or, in other words, facts determinative of the case, but are of particular or minor facts in the chain of evidence from which ultimate facts are to be found. Many of the facts to be disclosed by the answers are not in dispute in the case. Others are in dispute, but the answers would be quite unimportant, as affecting the general verdict. The effect of the questions, as a whole, would have been rather to confuse the jury than to aid it to a correct result. The court submitted six questions presented by the plaintiff, which, we think, covered the material and necessary points for special

findings. See, upon this point, *Thomas v. Schee*, 80 Iowa, 237, 49 N. W. Rep. 539; *Winter v. Railway Co.*, 80 Iowa, 443, 45 N. W. Rep. 737; *Hawley v. Railway Co.*, 71 Iowa, 717, 29 N. W. Rep. 787.

IX. By reference to the statement of the case it will be seen that there is a dispute as to two items of credit, making up the aggregate of six hundred and seventy-three dollars and fifty-three cents. The two items of credit as to which there is dispute pertain to the sale of property under a foreclosure of a chattel mortgage given by Shelton & Barber to secure the notes in suit. Plaintiff claims to have paid, as an item of expense in such foreclosure, which was by notice and sale, the sum of thirty-three dollars as attorney's fees, and that amount is not included in the credit. The court, in its instructions, directed the jury to increase the credit to the extent of the attorney's fees, thus holding that defendant's were not liable for it. The plaintiff offered to prove that it "incurred and paid as expenses of said foreclosure, the sum of thirty-three dollars to Snow Brothers on the fourth day of August, 1888, and the same was incurred under the provisions of said mortgage." The provision of the mortgage relied upon is that the mortgagor will pay "all charges, costs, and expenses of such removal and sale, and also all charges of agents and attorneys for service in such removal and sale." There is no proof in the case as to the value of the services rendered. The provisions of the Code, in so far as they limit the amount to be allowed as attorney's fees, seem to apply to actions pending in court, and not to foreclosures of mortgages upon notice and sale. It will be observed that the offer of proofs by plaintiffs does not include the reasonable value of legal services rendered, but what was "incurred and paid" by him. This offer is upon the theory that plaintiff was entitled to what he had paid as such expense. Certainly, the contract can

not be construed as an obligation to pay more than the services were reasonably worth. It would be an unwarranted construction to hold that the mortgagors were bound for whatever sum should be paid by the mortgagee, whether reasonable or not. Without determining the question of whether or not, under such a contract, an attorney's fee can be recovered, we are clear that the offer of proofs was properly refused, and that, under the condition of the record, the item of the attorney's fee was properly excluded.

X. Appellee filed additional abstracts after the time prescribed by the rules, and appellant moves to strike them from the files. It does not appear that the delay in filing has caused any delay in the submission of the cause, nor any prejudice to appellant. In the main, they were justified by the condition of appellant's abstract. The motions to strike and to tax the costs to appellee are overruled. *Scholl v. Bradstreet Co.*, 85 Iowa, 551, 52 N. W. Rep. 500; *Wilson v. Daniels*, 79 Iowa, 132, 44 N. W. Rep. 246; *Thomas v. McDaniel*, 77 Iowa, 126, 41 N. W. Rep. 592.

XI. We have omitted a consideration of some of the assignments argued because they do not involve questions of such importance that rulings thereon would serve as useful precedents. Many questions have been presented as to the admission and exclusion of evidence. They have been examined, and no prejudicial error is found. The case seems to have been fairly tried in the district court, and its judgment is
AFFIRMED.

90	300
108	520
90	300
144	458

EVELINE BIGELOW V. ROLLIN BURNHAM, Appellant.

Conflict of Laws: Action on Note. A note dated, "Storm Lake, Iowa," executed and delivered by a resident of Iowa in New York, reserved a rate of interest legal in Iowa but illegal in New York, the parties intending that Iowa law should govern the contract, is enforceable in Iowa. (3)

Variance by Parol. Whether the presumption that a note is payable where dated is rebuttable by parol is not decided. (3)

Proving Needless Allegation. An averment showing how title to a note was obtained is unnecessary where the payee has possession of it, and need not be proven until the presumption of ownership raised by that possession is overcome. (2)

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

SATURDAY, FEBRUARY 3, 1894.

ACTION on a promissory note. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

Wm. Milchrist and *C. A. Irwin* for appellant.

Nagle & Birdsall and *T. D. Higgs* for appellee.

KINNE, J.—I. Plaintiff sues on a promissory note worded as follows:

"STORM LAKE, BUENA VISTA COUNTY, IOWA.

"For value received, I promise to pay Rufas Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents within one year from date, with interest at seven per cent.

"ROLLIN BURNHAM.

"May 2, 1885."

She, in an amended petition, averred that this note was executed in renewal of an indebtedness from defendant to Rufas Burnham for real estate sold by

the latter to the former, and prayed for the establishment of a vendor's lien upon the land. The defendant admitted the execution and delivery of the note, that it had not been paid, and denied all the other allegations of the petition. Defendant also pleaded that the note was executed in the state of New York to evidence a contract there made, and that under the laws of that state it was void, as in violation of the statutes relating to usury. In a reply, plaintiff denies that the note was executed in New York; avers that, when executed, defendant was a resident of Iowa, and that the note was made with reference to the laws of Iowa, and was in fact an Iowa contract. The cause was tried in equity to the court, and a judgment entered for the plaintiff, but a vendor's lien refused.

II. This case has once before been in this court. See 49 N. W. Rep. 104. On the trial below, plaintiff introduced in evidence the will of Rufas Burnham, and the probate thereof in the state of New York. It is said that this can not be done, as the will was never probated in this state. This will gave to plaintiff certain property, including the note in suit, after the payment of lawful debts and obligations of deceased, his funeral expenses, and certain legacies. The executor testified that all these had been paid before he delivered the note to plaintiff. The note is payable to bearer; it is shown to have been properly delivered to plaintiff; it was in her possession; and possession, alone, of such a note, authorizes the holder to sue thereon. *McCormick v. Grundy Co.*, 24 Iowa, 382; *Allensworth v. Moore*, 3 G. Greene, 273; *Riggs v. Price*, *Id.* 334. In the case at bar, plaintiff's petition contained an unnecessary allegation showing how she derived title to the note. If she had simply averred her ownership and possession, and claimed the amount due thereon, it would have been a sufficient allegation of her title; and, the note being in her possession, the

presumption of law would obtain, until rebutted, that she was the owner of the instrument. *Allensworth v. Moore, Id.* 273; *Rubey v. Culbertson*, 35 Iowa, 264; *Stoddard v. Burton*, 41 Iowa, 582; *King v. Gottschalk*, 21 Iowa, 512; *Hesser v. Doran*, 41 Iowa, 468. Now, although plaintiff had made an unnecessary allegation in her petition, she was not bound to establish the same on the trial. As the defendant introduced no evidence to overcome the presumption of ownership which arises from the possession of the note, plaintiff's case, as to title to the note and right to sue thereon, was established *prima facie* by her introduction of the note in evidence; and the introduction of the will, and probate thereof, to show how her title was devolved, was not necessary until defendant had introduced evidence to overcome the legal presumption which arose from her possession of the note. Hence, we may discard the will and its probate entirely, and still plaintiff's case, as to title and right to sue, is complete. Under these circumstances, we need not determine whether the will, and probate of it, could properly be introduced in evidence, as, if error, it could work no prejudice.

III. On the former appeal, it was held that the note, on its face, would be presumed to be payable in Iowa; that where a contract was made in one state to be performed in another, and a rate of interest was contracted for which was lawful in the one state and unlawful in the other, it would be presumed that the parties contracted with reference to the laws of the state wherein the stipulated rate of interest was lawful, and such presumption would prevail until overcome by proof that the transaction was a device to defeat the law against usury. It was also held that, in cases like that at bar, the law will effectuate the intention of the parties. These propositions are all supported by authorities cited in the opinion. *Bigelow v. Burnham*,

83 Iowa, 120; 49 N. W. Rep. 104. Counsel for defendant contend that the contract was made in New York, and was to be performed there, and, as it reserved a greater rate of interest than is allowed under the laws of that state, it is void. We have, no doubt, from the record now before us, that the contract evidenced by the note was made in New York. Defendant went to New York from Iowa on a visit, and, while at his father's house, entered into the agreement to borrow the money for which the note was given. The note, while dated in Storm Lake, Iowa, was, in fact, executed and delivered in New York. The money loaned was there paid over to defendant. In view of what was said in the former appeal, and of the grounds on which we rest our present decision, we do not deem it necessary to enter into a discussion of the question as to whether the presumption which the law raises as to the place of payment being in the state of Iowa can be overcome by parol evidence showing that payment was to be made elsewhere. Now, it is conceded by counsel that a citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed in the latter state. If that was the transaction between the parties to this note, then it may be enforced in this state. We think the parties entered into this contract in view of, and expecting it to be controlled by, the laws of Iowa, and that it is valid and enforceable here. From the record, it appears that defendant had, for a long time before the execution of this note, been a resident of Iowa, and when he executed it he was such a resident. It seems clear that it was the intention of his father, in making the loan, to have it controlled by the laws of Iowa. Both parties knew that a note drawing seven per cent. interest would be void under the laws of New York. The note was dated "Storm Lake, Iowa;" no particular place of payment was mentioned; and, at least, in the absence of

evidence to the contrary, it would be payable there. The conversation had with reference to the dating of the note clearly indicates that, so far as the payee was concerned, he intended the contract to be governed by our laws. The defendant accepted the money knowing that, and we think, under all the circumstances, it should be held that both parties entered into the contract in view of the law of Iowa as to interest. The defendant, for years, treated the contract as valid and binding upon him under our law; and he ought not now to be permitted, under all the circumstances, to claim that it was a device to defeat the usury laws of New York. We have not deemed it necessary to refer to the authorities, as they are fully cited in the opinion on the former appeal. Besides, there is no contention as to the right of parties, in such a case, to contract with reference to the rate of interest lawful in either state, and we hold that the testimony shows that that is what was done in the case at bar. We discover no reason why defendant should not pay this note. The judgment below is **AFFIRMED**.

90	304
109	500

90	304
115	700

**DEMOCRAT PUBLISHING COMPANY, Appellant, v. E.
LEWIS *et al.***

Wrongful Selection of County Paper: **APPEAL HOW TRIED.** On the trial of an appeal to the district court from a finding made by a board of supervisors on a charge of fraud against an applicant desiring to have his paper designated a county paper, *ex parte* affidavits are inadmissible. Code, 307, 2504, 2508, 2513 and 2741, construed. (1)

SAME: AT HEARING BEFORE BOARD. Whether such affidavits are admissible at the hearing before the board, admits of grave doubt. (1)

Benefit of Suit not Considered. The fact that the costs exceed the benefits to be realized from the litigation, can not change prescribed rules of evidence. (3)

Jurisdiction on Appeal: Amount Involved. This court has jurisdiction on appeal, unless it appears, by the pleadings, that less than one hundred dollars is involved. Code, section 3173. (2)

Appeal from Lucas District Court.—HON. H. C.
TRAVERSE, Judge.

SATURDAY, FEBRUARY 3, 1894.

THE plaintiff company is the publisher of the Chariton *Democrat*, published in Lucas county. The Chariton *Patriot* and the Chariton *Herald* are also published in that county, the *Patriot* being published by the defendant Lewis. Each, under the law as to county printing, filed with the county auditor certified statements of *bona fide* subscribers, and the board of supervisors selected the *Herald* and *Patriot*, and awarded to them the printing. The plaintiff company appeal.—*Reversed*.

J. A. Penick, C. C. Leach and Will H. Barger for appellant.

Stuart & Bartholomew for appellees.

GRANGER, C. J.—The selection of the *Herald* as one of the papers to do the county printing is conceded to be correct, and it is not involved in the controversy. To the certified statement of subscribers, as filed by the plaintiff company, the publisher of the *Patriot* filed charges of fraud, and the board of supervisors, in its investigation of the charges, received and considered a large number of *ex parte* affidavits offered to sustain the charge of fraud. At the trial in the district court, one hundred and seventeen such affidavits were admitted in evidence, against the objection of plaintiff as incompetent, and, upon such ruling of the court, error is assigned. The following is section 307 of the Code: “The board of supervisors shall, at its January session of each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona*

fide yearly subscribers within the county, which circulation shall be determined as follows: In case of contest the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement subscribed and sworn to before some competent officer, giving the names of the several postoffices, and the number and names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county, such statements to be in sealed envelopes and opened by the county auditor upon direction by the board of supervisors to do so; and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors * * * shall be published, at the expense of the county, during the ensuing year. * * * In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation, and the aggrieved publisher shall have the right of appeal to the circuit (district) court for redress of grievance. Said appeal shall be taken as in ordinary actions." Appellant, with a view evidently to strengthen its position as to proper evidence in the district court, contends that such affidavits are not proper before the board of supervisors under the requirements of the law that, where charges of fraud are made, it "shall seek other evidence of circulation," but contends that, when the charges are made, the board becomes a judicial tribunal, and can only receive evidence that would be proper in an ordinary judicial tribunal. The practice assailed is open to grave doubts; but, as it is not essentially involved in the assignments of error we are to consider, we do not determine it. If we assume, for the purposes of the case, that, in the proceeding before the board, it was not limited to the ordinary rules of judicial inquiry, but might obtain

information as to the circulation in any way that seemed to it best, including *ex parte* affidavits, it does not follow, as a legal conclusion, that the same liberality is to obtain in the district court when the proceeding is brought there on appeal. The appeal presents to the district court an issue of fact on a charge of fraud. It is an issue of fact, pending for trial in a judicial tribunal. Remedies are divided into actions and special proceedings. Code, section 2504. The two embrace every remedy in civil cases. After defining what actions must and may be brought by equitable proceedings, and then what may be brought by ordinary proceedings (sections 2508-2512), it is said (section 2513): "In all other cases, except as in this Code otherwise provided the plaintiff must prosecute his action by ordinary proceedings." It is nowhere "otherwise provided" as to cases like this. The section of the Code permitting the appeal from the action of the board (307) provides that the "appeal shall be taken as in ordinary actions." With these provisions, there can be really no doubt but that the case was in the district court for prosecution as an ordinary action. By section 2741 it is provided: "All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as now provided by law." These provisions of the law are in the title of the Code "Of Procedure in Courts of Original Jurisdiction;" so that, even though they might not be applicable to a tribunal not a court of original jurisdiction, they do apply to proceedings pending in a court of such jurisdiction. After the appeal, the action was one in a court of original jurisdiction, with an issue of fact to be tried, making section 2741 directly applicable. These considerations seem very conclusive of the question before us, and the district court, in admitting the affidavits, was in error. The fact that the court offered to permit

appellant to produce the affiants for cross-examination would not change the rule. It was a question of the admissibility of direct testimony.

II. Appellees present a question as to the jurisdiction of this court, because there is no certificate, and the amount in controversy is less than one hundred dollars. The difficulty is that the amount in controversy does not appear, and, under the law, we are without jurisdiction only when the amount is less than one hundred dollars, "as shown by the pleadings." Code, section 3173.

III. There is a claim, that because of the number of witnesses, and the great expense of producing them, the costs would far exceed any benefits to be realized from the litigation. The prescribed rules of evidence can not be changed to meet such emergencies. They apply to all cases alike. The judgment is REVERSED.

A. M. HAGGARD, Appellant, v. W. G. HOLMES *et al.*

Family Necessaries Defined: LIABILITY OF WIFE FOR. A county history bought by the husband, containing pictures of himself and wife, which, while used by the family and properly classed as for its use and benefit, is not needed by it, is not chargeable upon the wife when she forbids the purchase and notifies the vendor that she will not be bound by it. Code, section 2214, and *Devendorf v. Emerson*, 66 Iowa, 698, construed and applied.

Appeal from Muscatine District Court.—HON W. F. BRANNAN, Judge.

SATURDAY, FEBRUARY 3, 1894.

ACTION to recover the amount due on certain promissory notes given by the defendant W. G. Holmes. His wife and codefendant Hannah Holmes, filed a demurrer to the petition, which was overruled, and then filed an answer, which contained two divisions. A

demurrer of the plaintiff to the second division was overruled. He elected to stand on his demurrer, and judgment was rendered in favor of Hannah Holmes for costs. The plaintiff appeals.—*Affirmed*.

N. Rosenberger and Detwiler & Doran for appellant.

No appearance for appellee.

ROBINSON, J.—The petition alleges that the defendant W. G. Holmes purchased an atlas or history of Muscatine county, Iowa, with pictures of himself and his wife inserted therein, and that he gave the notes in suit in settlement of the indebtedness incurred by his purchase; that the book was purchased for the benefit of the family of the defendants, and was used and kept for use by the family. In the second division of her answer, Mrs. Holmes alleges that, when the vendor of the book sought to sell it to her husband, she protested to the vendor against the purchase, and notified him that she did not want the atlas, and would not purchase or pay for it; that the vendor induced her husband to take the book, and give his notes for it, against her protest, well knowing that she had refused to sanction or consent to the purchase, with intent to cheat and defraud her, and to compel her to pay for the book from her separate property, under the pretense that the purchase was a family expense. The theory of the plaintiff's demurrer is that the husband, as the head of the family, had the right to incur a family expense, and thereby charge the separate property of the wife, although she objected to the purchase, and refused to consent to it. The pleadings do not show that the book was a family necessity. Something is claimed by the appellant from the ruling of the district court on Mrs. Holmes' demurrer to his petition, but the most that can be said for it is, that it held that the book was an item of family expense, because purchased for, and kept

and used by, the family. It was not held, and the pleadings do not show, that it was a family necessity. We are, therefore, required to determine whether the husband may bind the property of the wife against her will, and notwithstanding her protest, in purchasing an article which is used by their family, and is properly classed as for the use and benefit of the family, but is not necessary for it. Section 2214 of the Code is as follows: "2214. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." That section was construed in *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. Rep. 515, where it was held that family supplies sold to the wife, when the sale had been forbidden by the husband, there being no evidence that there was a necessity for the purchase, were not chargeable upon the property of the husband. Some prominence was given to the fact that, as a general rule, the husband is the one upon whom the family depends for support, and that he was supporting the family in that case, and had the right to decide of whom he would purchase the family supplies; but the decision did not wholly rest upon that fact. We think that the doctrine of that case is applicable to this, and that the husband can not fix a liability, as against the wife, by purchasing articles for the family which are not needed by it, when she has, in effect, forbidden the purchase, refusing to be bound by it, and has duly notified the vendor of that fact. We conclude that the demurrer of plaintiff was properly overruled, and the judgment of the district court is **AFFIRMED**.

MRS. E. M. HEFFELFINGER, Appellant, v. A. HUMMEL.

Settlement of Disputed Claims: Consideration. A contract establishing a balance due to one party to it in lieu of disputed claims between the two, is on good consideration. (2)

SAME. It is held that the evidence establishes such a contract, and there is a reversal for a contrary holding, below. (1)

Appeal from Grundy District Court.—HON. J. L. HUSTED, Judge.

SATURDAY, FEBRUARY 3, 1894.

ACTION to recover for damages alleged to have been caused to plaintiff by sales of intoxicating liquors made by defendant to the husband of plaintiff, and to establish a lien therefor upon certain real estate; also, to recover an amount alleged to be due on account. There was a hearing on the merits, and a decree in favor of defendant. The plaintiff appeals.—*Reversed.*

C. E. Albrook for appellant.

R. J. Williamson and *Boies, Couch & Boies* for appellee.

ROBINSON, J.—The original petition in this case was filed September 24, 1891, and demanded judgment against defendant for the sum of five thousand dollars on account of sales of intoxicating liquors made to the husband of plaintiff, and consequent damages to her, and asking that her claim for damages be established as a lien upon the premises in which the sales were made; also demanding judgment for two hundred and sixty-nine dollars and fifty cents for medical services rendered by the husband of plaintiff at the request of defendant, the claim for which, the petition alleges,

has been assigned to the plaintiff. In November the defendant answered the petition, denying some of its averments, and pleading the statute of limitations as to some of the alleged sales. He denied any indebtedness on the account in excess of the sum of one hundred and eighty-three dollars. On the eighth day of December the plaintiff filed a supplemental petition, in which she alleged that in the latter part of September, and since the commencement of the action, she and the defendant had agreed that he should pay her the sum of five hundred dollars and costs as settlement in full of her claims set out in the petition, and including an account defendant had presented as an offset to the account assigned to her. She, therefore, demanded judgment against him for five hundred dollars on the agreement of settlement and costs. The defendant filed an answer to that pleading, in which he denied its averments, and alleged that the agreement of settlement had not been carried out by plaintiff, and that it was without consideration and void. The action was tried as in equity, and after a hearing on the merits the supplemental petition was dismissed. At a subsequent term, but before the judgment entry had been signed, the court, on the application of defendant, corrected the record, and made it show that both the original and supplemental petitions had been dismissed. The appeal is from the judgment as first rendered and as corrected.

I. The appellee contends that the evidence does not show that a settlement was made as claimed. The averment of the pleading that the settlement was made in September was evidently an error, as the negotiations for it were not concluded until after the answer to the original petition was filed. The plaintiff was married to her husband about thirteen years before the hearing in the district court was had, and during that time they had resided in Grundy Center.

He was a physician, and the defendant was a saloon keeper, and, later, a druggist. The plaintiff claimed that defendant had sold her husband intoxicating liquors for several years, and that, in consequence of drinking liquors so obtained, she had suffered personal violence from him, and had been injured in her means of support. Her husband had rendered professional services for the family and brother of defendant, on account of which he admitted an indebtedness, as stated, for services rendered his family. Before this action was commenced he presented an account to the plaintiff against her husband for merchandise of various kinds to the amount of one hundred and sixty-six dollars and sixty-six cents, and for an item of seventy-five dollars "for saloon bill." After the action was commenced, he visited her several times for the purpose of effecting a settlement. She states that he finally offered to pay her five hundred dollars and costs in settlement of the matter in controversy between them, and that she accepted the offer. She further states that he left her when the settlement had been effected, promising to return with the money and pay her within fifteen minutes; that he did not return as agreed, and has never paid her any money; that he afterward called on her, and asked her to accept less than the sum agreed upon, but that she refused to do it, insisting that they had already effected a settlement; that he admitted that they had done so, but said he had changed his mind. She is corroborated in what she says in regard to his admissions by two witnesses. The defendant denies the alleged settlement, and says he offered her but four hundred dollars, which she refused to accept. He denies the alleged admission, and in that is corroborated by one witness. The answer denies knowledge or information of the assignment of the account claimed by plaintiff sufficient to form a belief. The evidence in regard to the assignment is

meagre, but sufficient, in the absence of conflicting evidence, to show that the account is owned by the plaintiff. Several questions, which treated the account as having been assigned to her, were answered in the affirmative without objection on the part of defendant, and we think it is established that, at the time it is claimed the settlement was made, the defendant owed the plaintiff one hundred and eighty-three dollars on the account. While the attempts for a settlement were being made, the defendant admitted to her that money would not compensate her for the damages she had sustained by reason of the sales of liquor to her husband, but he claimed he had not made all of them. We are satisfied that defendant considered himself liable to plaintiff for a considerable sum of money on account of the claims she was urging against him, and that for the purpose of settling them he agreed to pay her the sum of five hundred dollars and costs. The greater number of witnesses testify to that effect, and they are corroborated to some extent by the admission of the defendant, and the conditions which are shown to have existed when the settlement was made.

II. The appellee contends that the agreement was for an accord and satisfaction, and, as it has not been executed, that it can not be enforced. He admits, however, that "when the owners of conflicting and disputed claims against each other, or the parties to a disputed and unliquidated claim in favor of one and against the other, enter into a contract by which the original demand or demands are waived and extinguished,—a contract which is made and accepted in lieu of the original demands and in satisfaction of them,—such a contract is supported by a sufficient consideration and is valid." This is in substance a correct statement of the law. *Schaben v. Brunning*, 74 Iowa, 102, 36 N. W. Rep. 910; *Nelson v. Hagen*, 72 Iowa, 706, 31 N. W. Rep. 875; *Richardson & Boynton*

Co. v. Independent District of Hampton, 70 Iowa, 574, 31 N. W. Rep. 871; *Merry v. Allen*, 39 Iowa, 235; *Hall v. Smith*, 15 Iowa, 584. We think this case is governed by the rule of the cases cited. The agreement was intended to be a settlement of all matters in dispute between the parties, and to be in lieu of other liabilities which were claimed to exist. We conclude that the decree of the district court is erroneous, and it is therefore REVERSED.

B. A. WILLSON, Appellant, v. FELTHOUSE BROTHERS
& MOORE.

90	315
118	544
118	545

Attaching Mortgaged Property without Statutory Deposit:
WAIVER. No one but the mortgagee can insist that an attaching creditor shall pay his mortgage, or deposit enough to do so with the clerk, as provided by Acts, Twenty-first General Assembly, chapter 117, section 1, and the mortgagee may waive his rights under that act.

Appeal from Cerro Gordo District Court.—HON. G. W. RUDDICK, Judge.

SATURDAY, FEBRUARY 3, 1894.

ON THE eleventh day of February, 1892, one Armsbury made to the plaintiff a written assignment of his property for the benefit of his creditors. This action was brought by the assignee to recover damages of the defendants for wrongfully taking and disposing of certain property belonging to the insolvent assignor. It was held by the district court that the defendants were not liable, and plaintiff appeals.—*Affirmed*.

Wm. Hoy, A. H. Cummings and Cliggitt & Rule for appellant.

Blythe & Markley and R. Wilber for appellees.

ROTHROCK, J.—The appeal involves but one question, and the controversy between the parties can be better understood by a plain statement of the facts than by attempting to reproduce the averments of the pleadings. As we have said, Armsbury made an assignment to the plaintiff on the eleventh day of February, 1892. The defendants, Felthouse Brothers & Moore, were creditors of Armsbury. Long before the assignment was made, Armsbury executed to one Willson a chattel mortgage upon property which was included in the general assignment. The mortgage was in the common form, and authorized the mortgagee to take possession of the property whenever he chose so to do. The mortgage was duly recorded, and the debt secured thereby was not due when the general assignment was made. On the day before the assignment was made, the said defendants commenced an action against Armsbury to recover the debt due to them, and procured a writ of attachment against his property. The writ was levied on the property included in the chattel mortgage on the eleventh day of February, and before Armsbury made his assignment to the plaintiff. The writ was levied on the mortgaged property without first paying, tendering, or depositing the amount of the mortgage debt; and the plaintiff claims that the levy was, for that reason, illegal and wrongful, and created no lien, and he demands a recovery of the value of the mortgaged property. It should further be stated that there was no showing that Armsbury, the mortgagor, nor Willson, the mortgagee, made any objection to the levy of the attachment. On the contrary, it appears that, within a few days after the attachment was levied, the defendants paid the amount of the mortgage debt to the mortgagee, and took an assignment of the mortgage. The question to be determined involves the proper construction of chapter 117 of the Acts of the Twenty-first General Assembly. That part of the chapter directly

in question is as follows: "Section 1. That personal property not exempt from execution hereafter mortgaged or heretofore mortgaged when the debt secured thereby is due may be taken on attachment or execution issued at the suit of a creditor of a mortgagor, but before the property is so taken the officer or plaintiff must pay or tender to the holder of the mortgage the amount of the mortgage debt and interest accrued, or must deposit the amount thereof with the clerk of the district court of the county wherein the mortgaged property is found, payable to the order of the holder of the mortgage.

* * *'' It appears to us that not only the part of the law above quoted, but the whole scope of the several sections of the chapter, show plainly that the statute was designed to permit a creditor to do just what was the purpose of the attachment in this case. Its object was to enable a creditor to reach, by attachment, the value of the mortgaged property in excess of the amount necessary to discharge the mortgage debt. There is not one word in the whole act for the protection of the mortgagor. We have no doubt that the mortgagee may waive any right to a deposit of the amount secured by the mortgage. The facts in this case show that there was not only acquiescence in the proceeding by the mortgagee, but, before the property was sold on the attachment, the mortgage was paid, and an assignment of the mortgage made to the defendants. The plaintiff, as assignee, stands in the place of the mortgagor. The writ of attachment was levied before the assignment for the benefit of creditors was executed. We do not think it is necessary to further elaborate the question, nor to discuss the effect of adjudged cases cited by counsel. It appears to us that an examination of the whole of the said act is sufficient to justify the correctness of the conclusion which we have reached. Its whole purpose is to authorize an attachment or execution in such cases by paying or securing the mortgagee. It contains no

provision authorizing the mortgagor to interfere with the proceeding. The case is, in effect, precisely in the same attitude that it would be if the mortgagee had expressly waived his right to payment of the mortgage, and assented to the levy of an attachment on the property. **AFFIRMED.**

ALTHEA TRASK, Appellant, v. CHAS. G. TRASK.

Delivery of Deed to Third Person: WHEN EFFECTIVE. Where a father delivers a deed, in which his wife joins, granting land to a son, to the cashier of a bank, stating to him, that if he, the father, were taken away his son should have what he had, and that he had settled with his wife, the deed is a delivery to the bank of a conveyance *in presenti*, and takes effect upon the death of the father, by relation, from the delivery to the bank. *Hinson v. Batley*, 73 Iowa 544, *approved.*

Appeal from Buchanan District Court.—HON. JOHN J. NEY, Judge.

MONDAY, FEBRUARY 5, 1894.

THIS is a suit in equity, and involves the rights of the plaintiff and the defendant in certain real estate and personal property once owned by Ami H. Trask, now deceased. There was a decree in the district court for the defendant, and plaintiff appeals.—*Affirmed.*

Charles E. Ransier for appellant.

E. E. Hasner and *H. W. Holman* for appellee.

ROTHROCK, J.—Ami H. Trask was a resident of the city of Independence, in this state. He died in the month of June, 1891, at the age of about sixty-eight years. The plaintiff is his widow, and the defendant is his son. He was twice married. The defendant is the son of his first wife. He married the plaintiff

90	318
97	80
90	318
106	589

90	318
112	136

90	318
118	551
118	552

90	318
1130	55
90	318
135	13

90	318
138	610

about twenty years before his death. His death was neither sudden nor unexpected. It was caused by the fatal disease known as cancer. The defendant was the only child born to him, and at the time of the father's death the son was about twenty-seven years old, and was married. The plaintiff never had any offspring. During the life of Ami H. Trask, he accumulated property of the value of from thirty to forty thousand dollars. It consisted of farms, a livery barn and livery stock, and city lots and bank stock, and other property. When he married the plaintiff, she had an estate in her own right, the value of which does not very clearly appear. It consisted in part of a dwelling house and some city lots. It does not appear that she at any time transferred any of her property to the deceased. In January, 1891, Mr. Trask went to Hot Springs, Arkansas, for treatment of the malady with which he was afflicted. Before making that trip he made his last will and testament, and also a deed of what was known as the Livery Barn Property, and what was known as his Sumner Township Farm. This deed was made to his son. It was signed and acknowledged by him and his wife, the plaintiff herein. At the same time he made to his son a bill of sale of his personal property. All of these written instruments were placed in an envelope, and delivered to the cashier of a bank. The deceased owned other real estate, which was then not disposed of. He returned from the Hot Springs in the April following. After his return there was a misunderstanding in regard to the deed, so far as it was a conveyance of the Sumner township farm. The plaintiff herein claimed that there was a mistake; that she did not understand that the deed conveyed the said farm. This claimed misunderstanding led to a readjustment of the matter, and the deceased and his wife each consulted attorneys, and the attorneys conferred with each other. A final

arrangement was made by the parties, which was intended as a settlement of all their property rights. This was amicable, and appears to have been really agreed upon by the deceased and his wife, without any interference of any one. It was in pursuance of advice given by the attorneys of both the husband and wife. The attorneys did not advise as to the amount Trask should give his wife. That matter was settled by the parties themselves. In pursuance of this arrangement conveyances were made of all the remainder of the real estate owned by Trask, which deeds Mrs. Trask signed and acknowledged. A deed was made by Mrs. Trask of all her real estate to her adopted daughter, and Mr. Trask joined therein, and released any prospective right he might have in her property. Up to this time the envelope containing the will and the deed to the Sumner township farm and livery barn property, and the said bill of sale, remained in the bank. On the day that the final settlement was made, the envelope containing these instruments was taken from the bank, because it had been claimed that Mrs. Trask had not intended to execute a deed for the Sumner township farm; and a new acknowledgment was written thereto, by which she again acknowledged its execution. When this was done, and as part of this full settlement, the deceased paid to his wife the sum of three thousand, five hundred dollars, by a bank check, which was in these words:

“INDEPENDENCE, IOWA, May 9th, 1891.

“*Peoples National Bank*: Pay to Althea Trask or order (\$3,500) three thousand and five hundred dollars. Settlement of all claims for dower.

“A. H. TRASK.”

On the same day the will and bill of sale of the personal property and the deed of the Sumner township farm were replaced in the same envelope and returned to the bank.

This action is grounded upon the alleged fact that the deed of the Sumner township farm and the bill of sale of the personal property did not pass the title of the property to the defendant, because they were not delivered to him. This is the only real question in the case. If the delivery of the envelope containing these instruments to the bank passed the title of the property therein, the decree of the district court should be affirmed. If it did not pass the title, the decree should be reversed. Counsel for the respective parties have argued this question at great length, and with much ability. They have presented a multitude of adjudicated cases upon the question. If we were to cite and comment upon all these cases, this opinion would fill a large part of a volume of our reports, and such a review of authorities would serve no useful purpose. The rule is well settled. The difficulty arises in determining, under the facts disclosed in evidence, what rule of law applies. It is well settled, and may be said to be an established rule, that a deed may be delivered to a third person for the grantee, and, if subsequently assented to by the grantee, it will be as good a delivery as if made directly to the grantee. But a delivery of a deed to a stranger, to be delivered to the grantee at the direction of the grantor, or with a reservation of the right in the grantor to countermand it, does not pass the title. A delivery to a third person does not authorize a presumption that it is done with the intention of passing the title. The facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee. Every such case must be determined by the intention of the grantor. 5 Am. and Eng. Encyclopedia of Law, p. 445. In *Stow v. Miller*, 16 Iowa, 460, it is said: "If a father dies, leaving among his papers a deed of land, duly executed in form

to one of his children, the law will give effect to the same, if there is anything indicating the intention of the intestate that it should become effective. For example, the conveying to other children an equal portion of his real estate, as was done in this case, a court of equity would be much inclined, in order to effectuate the ends of justice, to declare the deed valid, as was done in the case of *Scrugham v. Wood*, 15 Wend. 545, and this is about as far as the courts have gone on this subject." The facts attending the delivery to a third person which may pass the title to the grantee are not required to be such as that it is beyond the mental power of the grantor to alter his intention, or that he has not the physical power to regain possession of the deed. *Newton v. Bealer*, 41 Iowa, 334. As we have seen, the intention of the grantor is the polar star by which courts must be guided in determining the question.

We have said that when the deed and bill of sale were delivered to the bank the last will and testament was in the same envelope. The will, so far as it relates to his wife, was as follows: "I give and bequeath to my wife Althea Trask, one third of all property of which I may die seised or possessed, whether the same is real or personal; to have and to hold the same forever, less the amount already paid to her, and paid for improving her property." At the time the papers were deposited with the bank, the testator had real estate remaining after the conveyance of the Sumner township farm. It is claimed with great confidence on the part of appellant that the grantor surely did not intend that the title should pass to his son, because, when he made the final disposition of all of his property, on the ninth day of May, 1891, he placed the will in the same envelope, and returned it to the bank. It is to be conceded that the act was not in accord with an intention that the title to the property should pass to his son;

and one or two witnesses testified that he declared to them, after the final settlement, that the papers did not amount to anything, or words to that effect. In our opinion, this and other evidence relied on by appellant is fairly overcome by the other facts and circumstances in the case, a few of which we will mention: It does not clearly appear what was indorsed on the envelope when it was delivered to the bank. It was first delivered to the cashier of the bank by Trask, in person. He stated the contents of the envelope, and told the cashier they were for Charlie, his son, if anything happened to him (the grantor). This was the day before he went to Hot Springs. After his return, and it was made known that his wife claimed that she did not intend to join in the deed to the Sumner township farm, and when the final settlement was made, the papers were withdrawn from the bank, for no other purpose than to have said deed re-acknowledged, and when that was done it was immediately returned to the bank. It appears to us that the only purpose in taking the deed from the bank was to make it effective against any assault upon it which might afterward be made by his wife. It was not under a claim that he was dissatisfied with the deed, but quite the contrary. Above all, there is the undisputed fact, standing out all through the evidence, that the settlement made on the ninth day of May, 1891, was a complete adjustment of all their family property rights; and, when the envelope, with the inclosures, was returned to the bank, they were returned for the son, and either at or about that time he stated that, if he should be taken away, his son was to have what he had, and that he had settled with his wife. This is strongly corroborated by the check for three thousand, five hundred dollars, which he gave her when the settlement was made. We might cite many other circumstances which tend to show that the title to both the real and

personal property passed by the delivery of the deed and bill of sale to the bank. But it is not necessary to further elaborate the case.

There is a question made about whether there was a change of the possession of the personal property from the father to the son. There was no occasion for such change. The son had been virtually in the actual possession for some time before the bill of sale was made. We will say that there is no claim made that the deed and bill of sale were testamentary in their character, and invalid because not executed with the formalities of a will, and the facts do not warrant any such conclusion. If the instruments were delivered to the bank as conveyances *in præsenti*, they took effect upon the death of the father, by relation, from the delivery to the bank. *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. Rep. 626. The decree of the district court is **AFFIRMED**.

90	324
106	333
140	324
117	387

JOHN H. SCHWARTZ, Appellant, v. SAMUEL C. DAVIS & COMPANY *et al.*

Wrongful Attachment Without Sale: MEASURE OF DAMAGES.

Where property wrongfully attached is taken from the possession of plaintiff's mortgagees who are selling it under their mortgages, and independent proceedings are brought by the attachment creditor under which, instead of the attachment, the property is sold by consent, nominal damages only can be recovered on the attachment bond.

FAILURE TO GIVE NOMINAL DAMAGES, NO REVERSAL. An omission to grant nominal damages will not warrant a reversal.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTHE, Judge.

MONDAY, FEBRUARY 5, 1894.

THE following is a statement of facts as made by appellant: "On the twenty-ninth of December, 1884, Samuel C. Davis & Company sued out of the district

court of Lee county an attachment against John H. Schwartz, the plaintiff herein, on the sole ground that Schwartz was then about to dispose of his property with intent to defraud his creditors. Defendant Joseph A. Smith is surety on the attachment bond for forty-five thousand dollars, which was filed in that case. The attachment was levied, on the day it was issued, on a stock of merchandise belonging to Schwartz, alleged to be of the value of one hundred and thirty thousand dollars. J. H. Hellman and others served written notice on the sheriff of their claims to the attached property by virtue of several chattel mortgages thereon. Davis & Company immediately furnished an indemnifying bond, and the property was held under the levy. The attachment suit was, on the application of Davis & Company, removed to the United States circuit court for the eastern division of the southern district of Iowa, in which court Davis & Company filed a petition in equity, alleging the levy of said writ on said stock of merchandise, the property of Schwartz; that the levy was then of full force; and that by reason thereof, they were entitled to have a lien thereon, to secure their debt sued for in the attachment suit. It was also alleged that Schwartz had made certain mortgages to Hellman and others, aggregating forty-two thousand, one hundred and ten dollars and eleven cents, on the attached property for the purpose of hindering and defrauding creditors. The mortgagees and Schwartz were made defendants, and the prayer was that the mortgages be set aside; that the property be decreed to be the sole property of Schwartz, subject to their attachment; and that defendants be restrained from suing for the same. In that suit Davis & Company subsequently filed an application for a receiver to take charge of and sell the attached property, on the ground that there was danger of deterioration in value, etc. On the seventeenth of January, 1885, the court,

after hearing the evidence and arguments of counsel, appointed one Kiser receiver, and required him to cause the property to be appraised, and to sell and dispose of the same in such manner as he thought fit, at private sale, except that he should not sell at less than three fourths of the appraised value; the net proceeds of sale to be deposited in court, to the credit of said equitable suit. The receiver being thus fully empowered by this order to sell the entire property, a *pro forma* order was entered by the same court five days later in the attachment suit, with the consent of Schwartz, that, until further order, Kiser should act as receiver in the attachment suit, making his reports, however, only in the equity case. The attached property was appraised at eighty thousand, one hundred and sixty-nine dollars net, and was sold by the receiver for fifty thousand, one hundred and sixty-one dollars net. Schwartz and the mortgagees appeared and answered in the equitable suit, denying all allegations tending to show the invalidity of the mortgages. It was then stipulated that the attachment and equity suits, together with other attachment suits which had been subsequently brought against Schwartz, should be tried together. The causes were afterwards referred to P. T. Lomax, a master in chancery, for hearing, to report his findings of fact and conclusions of law for the information of the court. The master heard the causes, and on the first of January, 1890, five years after the attachment was sued out, filed a lengthy report of his findings and conclusions, to the effect that three of the chattel mortgages, although given to secure *bona fide* debts, were fraudulent as to creditors, and should be set aside. Exceptions to the report were filed, on the ground, among others, that the master should have found that the mortgagor and mortgagees acted in good faith, and that there was no evidence showing, or tending to show, any intention on the part of the

mortgagor or mortgagees to hinder, delay, or defraud the creditors of Schwartz. This exception, with others, was sustained, and the court, on the twentieth of June, 1890, adjudged all the mortgages to be valid, and that the debts secured thereby be first paid out of the proceeds of the sale of the attached property, which, being more than sufficient for that purpose, the balance of the fifty thousand, one hundred and sixty-one dollars was adjudged to be paid to certain attachment creditors of Schwartz. The present action is brought by Schwartz against Davis & Company and Smith, the surety on the attachment bond, to recover damages for the wrongful suing out of the attachment." The cause was tried to a jury that returned a verdict for defendants, and the plaintiff appeals.—*Affirmed*.

C. L. Poor, D. H. Miller, Jr., A. H. Stutsman and Casey & Stewart for appellant.

S. L. Glasgow, Eben Richards, J. D. M. Hamilton and James C. Davis for appellees.

GRANGER, C. J.—I. At the trial in the district court the defendants offered in evidence the report of the master in chancery in the federal court for the purpose of showing his conclusions on the question of the fraudulent execution of the chattel mortgages. Against objections of incompetency, irrelevancy, and immateriality, a part of the report was admitted, and error is assigned upon the ruling. Appellees contend that, notwithstanding this and other alleged errors, the judgment should not be reversed, because in no event, under the record, could plaintiff recover more than nominal damages. If it should be conceded that the admission of the master's report involves reversible error, without which the jury would have found that the attachment was wrongfully sued out, we bring ourselves to a proper position from which to consider the

legal effect of the proposition urged by appellee, for then the remaining question for the jury would have been that of damages, which alone, the proposition embraces. The district court, after defining the measure of damage as being the difference between the market value of the goods at the time they were seized by virtue of the attachment and the amount realized from the receiver's sale and passed to the credit of plaintiff, added the following: "11. But in this connection it must be borne in mind by the jury that they can allow only such damages as are shown by the evidence to have proceeded directly from the levy of said attachment, and not such as may have arisen from the acts of plaintiff himself; and if you find from the evidence that prior to the levy of the writ of attachment in question the plaintiff had parted with the title to the property levied upon by the execution and delivery of mortgages upon the same, and had placed the said property in the possession of the mortgagees who were proceeding at the time of said attachment to foreclose their said mortgages upon said property, or to subject the same to their claims by sale or other legal procedure, and the property in question was not taken from the plaintiff by the levy of said attachment, but from the mortgagees of plaintiff, then the said defendant can not be held liable for any loss arising from the sale of said goods under legal process, unless it appears from the evidence that the said sale was under and by virtue of the attachment proceeding, and not under proceedings of the said mortgagees under their claims upon the property." Complaint is made of the instruction in that it in effect told the jury that the execution of the mortgages deprived plaintiff of his title to his property. The instruction expresses no more, in that respect, than such a parting with title as would result from the execution of the mortgages. The instruction seems to state the law correctly, as appli-

cable to the facts within the record. The evidence is not before us in full, and we can not determine the correctness of the instruction as applied to it. With the state of the record before us, it must stand as the law of the case. Appellant presents this view of the law as to actual damage: The writ was levied December 29, 1884. If the writ was wrongfully sued out, plaintiff was entitled to the market value of the goods at that date; and that he would receive by fixing the market value at that date, and deducting therefrom the amount realized from the receiver's sale. That is the general rule, and it was, in effect, given by the court, subject to the rule of the instruction in question; and we gather, as the thought of the instruction, that if, when the goods were taken on the writ, they were then, by an act of the plaintiff, being subjected to a sale by creditors, and they were not afterwards sold under the attachment, there would be no liability on the bond for a loss resulting from the sale, for it does not appear that the sale resulted because of the attachment. Other and independent proceedings were instituted, and the property was, confessedly, sold, by consent, under such proceedings. It does not appear that the other proceedings were induced by the attachment suit, and it is a necessary inference that the sale, as it occurred, would have taken place without the attachment suit. The real effect of the other proceedings was to supersede the attachment suit as to the sale. How, then, could there be a liability on the bond for the consequences of such a sale? Taking the instruction as giving a proper rule, we may apply it to the facts of the case. Had the jury, upon a finding, as we have assumed, that the attachment wrongfully issued, proceeded to assess the damages, it must have followed the instruction, and under it no actual damages could have been returned if, by the attachment, the property was taken, not from plaintiff, but from the mortgagees,

and it had been placed in their possession by the execution of the mortgages, and the mortgagees were, at the time of the seizure, proceeding to subject the same to their claims by sale or other legal procedure, unless the sale was under and by virtue of the attachment proceedings, and not under proceedings of said mortgagees. The undisputed facts take the case without the rule permitting damages. A fact additional to what has been stated appears in appellant's abstract as follows: "The mortgage debts were payable on demand. Payment had been demanded, and the mortgagees were in possession of the goods attached at the time the writ was levied, offering to sell the same in the usual way of trade." These facts, with those originally stated, show that the goods were not sold under and by virtue of the attachment proceedings; that they were taken from the mortgagees by virtue of the writ, where they were because of the mortgages; and they were, by sale, being subjected to the claims of the mortgagees. Applying the rule of the instruction to the facts of the case, the court could well have said to the jury that there could be no recovery of actual damages. The plaintiff, with the concessions herein made in his favor, was in no event entitled to more than nominal damages, and for such damages a new trial will not be awarded. *Williams v. Brown*, 76 Iowa, 643, 41 N. W. Rep. 377, and cases there cited. It is true that the cause involves a question of exemplary damages, but they do not follow nominal damages merely. *Kuhn v. Railway Co.*, 74 Iowa, 137, 37 N. W. Rep. 116. These considerations are conclusive of the case on this appeal. The record presents no error that should change the effect of our conclusion that, at best, only nominal damages could be obtained, for which we will not reverse the case. It is, therefore, **AFFIRMED.**

TUTHILL SPRING COMPANY *et al.*, v. J. D. K. SMITH and
JOSEPH EDGINGTON, Appellants; and Ten
Other Cases.

90	331
104	386
105	148

90	331
1133	408
133	562

Corporate Stock: Unpaid Subscription. A stockholder knew that stock which he claims to hold as collateral security was not paid for. It does not appear that the corporation assented to its being so held. He and a trustee for him voted the stock. *Held*, that he was liable to creditors of the corporation for the amount unpaid on the stock. (6)

SAME. Without any agreement that it should be done, a stockholder was given additional shares of stock which stood on the books in his name and which he neither disclaimed nor offered to return. *Held*, that he was liable to corporation creditors on such shares as for an unpaid subscription. (7)

Judgment Against Corporation: Collateral Attack by Stockholder. Stockholders can not collaterally assail a judgment against their corporation on the ground that the claim upon which it is founded was collusively assigned to give the federal courts jurisdiction; especially where the corporation has no set-off against the assignor. (4)

Depositions: Who May Take. The persons before whom depositions may be taken under Code, 3735 may have the examination written out by another. (8)

FILING SAME TOO LATE. Where depositions are not filed within a time fixed and neither bad faith or prejudice are shown, a motion to suppress made after two terms have elapsed since the filing is to be overruled, and should have been made early enough to allow the retaking of the depositions. (2)

Amount in Controversy: Consolidated Cases: ASSIGNMENT OF ERRORS. Where law cases and an equity case are consolidated and tried together as in equity, without objection, there is jurisdiction on appeal if the amount involved in the cases as consolidated, in the aggregate, exceeds one hundred dollars, though separate judgments are rendered below, and there may be a review *de novo* without an assignment of errors. (1)

Striking Amendment to Abstract. Appellee's amendment to abstract will not be stricken for being filed later than appellant's argument where appellant tells appellee that he intends filing an amendment to his abstract and then files such amendment and his argument at the same time. Appellee had a right to wait for appellant's amendment before filing an amendment himself. (5)

Counterclaim. Where a counterclaim shows on its face that it is payable upon a contingency which has not occurred, there should be no judgment upon it though it be not denied. (7)

Appeal from Hardin District Court.—HON. S. M. WEAVER, Judge.

MONDAY, FEBRUARY 5, 1894.

THE Tuthill Spring Company brings this action in equity, and alleges that it is a judgment creditor of the Shaver Wagon Company, an insolvent corporation organized under the laws of Iowa; that at the time of the creation of said indebtedness, the rendition of said judgment, and the commencement of this action, there stood in the name of defendant Smith capital stock of said company in sum of ten thousand dollars, no part of which was paid, and in the name of defendant Edgington six hundred dollars, only half of which had been paid; that the firm of C. Hardin & Sons, of which defendant Smith was a member, held sixty thousand dollars of said stock as collateral security, which stock was voted by said firm through said Smith; that defendant Smith caused said stock to be transferred on the books of the company to defendant Herman Dolph, who holds the same for said firm, and that nothing has ever been paid for said stock. The plaintiff, the Tuthill Spring Company, asks for an accounting with the defendants as to the amount of unpaid stock held by each, and for judgments. The defendant Smith answered, admitting that plaintiff obtained judgment against the Shaver Wagon Company, as alleged, but avers the same was procured by fraud and collusion; admits that ten thousand dollars of the capital stock of the Shaver Wagon Company stood in his name, but denies that, at the time the indebtedness upon which said judgment was rendered arose, defendant Dolph held any of said stock, but admits that prior

to the rendition of said judgment sixty-two thousand dollars of said stock was transferred to said Dolph in trust as collateral security for C. Hardin & Sons and for W. T. Shaver, to be reassigned on payment of the debt for which it was security, and denies that said stock was not paid for. He alleges that W. T. Shaver deposited sixty thousand dollars of said stock, assigned in blank, with Hardin & Sons, to secure his indebtedness, of over twenty thousand dollars, existing at the time of the organization of the wagon company; that on November 1, 1885, he (defendant Smith) filled the blank with the name of Mr. Dolph as trustee, to be held as aforesaid, and that neither he, Hardin & Sons, nor Dolph owned said stock, or had any interest therein, except as security; that said shares were never voted by defendant or Hardin & Sons, and were not voted by Dolph prior to said transfer to him. The defendant Smith states as a further affirmative defense, in substance, as follows: That prior to July 5, 1882, W. T. Shaver was engaged in the manufacture and sale of vehicles, and had built up a large and flourishing trade, and owned a valuable plant and stock of materials and finished work, and patents, which, with the good will, was estimated at one hundred thousand dollars; that on July 5, 1882, the Shaver Wagon Company was incorporated, with a capital stock of one hundred thousand dollars, divided into shares of one hundred dollars each; that said Shaver transferred to said corporation all his said property, including book accounts, which was inventoried at ninety-nine thousand, four hundred dollars, in consideration for which he received nine hundred and ninety-four shares of said stock, which, with six other shares subscribed and paid for, made up the one thousand shares; that on the seventeenth day of July, 1882, certificate number 21, for one hundred shares of said capital stock, paid up as aforesaid, of the par value of ten thousand dollars, was

issued to said Shaver, and on the same day assigned by him to this defendant as collateral security for indebtedness due Hardin & Sons and this defendant; that on the same day said certificates were surrendered, and certificate number 24, for one hundred shares of fully paid up stock of said company, was issued in lieu thereof to this defendant to complete said security; that, on said seventeenth day of July, certificate number 20, for fifty shares, number 23, for five hundred shares, number 32, for twenty shares, and number 33 for fifty shares, par value, sixty-two thousand dollars, were issued to said Shaver as fully paid up stock, and afterward were deposited by Shaver with Hardin & Sons as collateral security, assigned in blank, and thereafter the blank was filled with the name of Herman F. Dolph, trustee, and transferred to him as before stated. Smith further avers in detail the facts upon which he relies as showing that the judgment set out in plaintiff's petition was procured through collusion, which allegations will be hereafter noticed. The defendant, Joseph Edgington, answered, denying that six hundred dollars' stock of said company stood in his name, or any other amount which had not been paid in full. He admits that three hundred dollars of said stock stood in his name, and alleges that the same had been paid for in full. By way of counterclaim, he asks to recover upon a promissory note of the plaintiff for eight thousand, eight hundred and fifty-eight dollars and fifty-two cents, as will hereafter be more fully noticed. The bill of plaintiff was dismissed as to all the defendants except J. D. K. Smith and Joseph Edgington, and judgments were entered against them in favor of the plaintiff, from which they appeal. Ten actions at law were brought by creditors of the Shaver Wagon Company against J. D. K. Smith, which, upon his motion, and in pursuance of a stipulation, were submitted below with the above entitled case, and

judgment rendered in each case against the defendant Smith, from which he also appeals.—*Affirmed*.

Huff & Ward for appellants.

C. E. Albrook for appellees.

GIVEN, J.—I. Certain of the plaintiffs in said law actions move to dismiss the appeals therein upon the grounds that the amount in controversy is less than one hundred dollars, and that no assignment of errors has been made. In the other of said actions the motions are upon the ground only, that there is no assignment of errors. It is true, as claimed, that in some of those cases the amount claimed is less than one hundred dollars, and that there is no bill of exceptions or assignment of errors in any of them. The record shows that it was agreed by all the parties, in open court, that each and all of these cases should “be consolidated and tried with number 5259, the case in equity.” It also appears that on motion the cause was, without objection, set for hearing on depositions; that depositions were taken with reference to all of said cases; and that they were tried together, as in equity, without objection. The claims of the plaintiffs, though resting upon the same facts as to the liability of the defendant, were separate and independent, and therefore separate judgments had to be rendered; but neither this, nor the allowance of time to file bills of exception, changes the fact that by agreement the cases were consolidated and tried as in equity. Being so consolidated, the amount in controversy in the combined cases exceeded one hundred dollars; and, having been thus tried in equity below, appellants are entitled to a trial *de novo* in this court.

II. This case was set for trial on depositions, and it was ordered that plaintiffs have until August 10, 1890, to file depositions; defendants to have until September 20, 1890, and plaintiffs to October 10, 1890, to

take rebutting evidence. The depositions in behalf of plaintiffs were not filed until after the dates fixed. On the day the cause was called for trial—June 23, 1891—and after two or more terms had elapsed since the filing of depositions, the defendants moved to suppress the depositions because not filed in time. There is no showing of bad faith or prejudice by reason of the delay. If the defendants desired the suppression of these depositions, they should have so moved at one of the preceding terms, so that the depositions could have been retaken, if necessary. See *Sweet v. Brown*, 61 Iowa, 669, 17 N. W. Rep. 44.

III. Plaintiff gave notice to take depositions before N. S. Carpenter, notary public. Defendant Smith appeared in person, and the other parties by their respective attorneys. The notary selected F. E. Brown, a shorthand writer, to take the examination in writing, whereupon defendants made objection as follows: "Here defendants object to the depositions being taken by F. E. Brown in shorthand—first, because the notice was served upon defendants to take the depositions before N. S. Carpenter, notary public, and not before F. E. Brown; second, because F. E. Brown is the clerk of C. E. Albrook, and in his employ, the attorney for the Tuthill Spring Company, the plaintiff in the case, and defendants protest against the testimony being taken in shorthand by F. E. Brown, who is the private secretary in the office of counsel for plaintiff, or in any other form."

This objection is upon two grounds, namely, that the notice was to take depositions before Mr. Carpenter and not before Mr. Brown, and that Mr. Brown was in the employ of plaintiff's attorney. The protest was not against the manner of taking the examination, but against its "being taken in shorthand by F. E. Brown, * * * or in any other form." Section 3735 of the Code is as follows: "The person before whom any of

the depositions above contemplated are taken, must cause the interrogatories propounded, whether written or oral, to be written out, and the answers thereto to be inserted immediately underneath the respective questions." There can be no question of the right of the person before whom depositions are taken to cause the examination to be written out by another. These depositions were taken before Mr. Carpenter, in pursuance of the notice, and not before Mr. Brown. It is denied that Mr. Brown was in the employ of plaintiff's attorney, and there is nothing in the record to show that he was at that time employed as stated in the objection. Appellants present no argument in support of these objections, and we think there was no error in overruling them. There was no prejudicial error, if error at all, in permitting plaintiff to read in evidence parts of the deposition of appellant Smith, as taken in the case of *Shaver v. Hardin & Sons*, under the stipulation shown in the record, nor in that appellants were permitted to and did read such other parts of said depositions as they desired.

IV. The facts upon which collusion and fraud are alleged in obtaining the judgment set out in plaintiff's petition are, briefly, these: W. T. Shaver held a promissory note of the Shaver Wagon Company, executed to him October 23, 1885, for eight thousand, eight hundred and fifty-eight dollars and fifty-two cents, due October 23, 1886. In November, 1886, Shaver, then a resident of Iowa, and the plaintiff, a resident of Indiana, transferred said note to plaintiff in consideration for the note of the plaintiff to him for the same amount, due at the same time, upon which is this indorsement: "This note is given for another note, this day purchased of me, for the same amount, signed by the Shaver Wagon Company, and is to be paid when the Shaver Wagon Company's note is collected, and not before. [Signed] "W. T. Shaver." Appel-

lants contend that this transfer was fraudulent, and done to enable the plaintiff to bring suit in the federal court and to collect said note from the Shaver Wagon Company for the benefit of W. T. Shaver, and to prevent the Shaver Wagon Company from setting up a defense by way of counterclaim against W. T. Shaver. When this judgment was obtained, appellant Smith was president and appellant Edgington a stockholder in the Shaver Wagon Company, and neither set up any counterclaim in favor of the company, nor is there any evidence in this case to show that any counterclaim existed in favor of the company. The judgment included other liabilities of the Shaver Wagon Company to the plaintiff than the note to Shaver. We conclude that, under the facts, it is immaterial to the wagon company, its officers, stockholders and creditors whether or not the judgment was in favor of plaintiff or of Shaver, and that the appellants should not now be heard to question the validity of the judgment on the ground of a want of jurisdiction in the federal court, in this collateral way.

V. Appellant Smith moves to strike appellees' abstract because not filed in time. He claims to have been prejudiced by reason of appellees' abstract not being filed until after he had filed his argument. Appellant's last amendment to his abstract was filed April 11, 1893. It appears by affidavit of appellees' counsel that appellant had informed them of his purpose to file an amendment to his abstract. Appellees could not know that an abstract would be required of them until appellant's was complete, and, with the assurance given, were justified in waiting for the amendment. Appellant did not wait for appellee's abstract before filing his argument, but filed it on the same day with his last amendment. If appellees' abstract called for further argument, appellant was entitled to make it. The motion to strike appellees' abstract is overruled.

VI. This brings us to consider the vital question involved in the merits of the case, namely, whether either of the appellant's held capital stock of the Shaver Wagon Company that had not been paid for, and upon which they should be charged in favor of appellees. The burden is upon appellee's to establish such liability. We first inquire as to the appellant Smith. There is no question but that he held certificate number 24 for one hundred shares of the capital stock of the Shaver Wagon Company, which certificate was issued to him in his own name upon his surrendering certificate number 21 for the same number of shares issued to W. T. Shaver, and assigned by Shaver to appellant Smith. It also appears without question that a number of certificates, aggregating sixty-two thousand dollars par value, issued to Mr. Shaver, were assigned by him in blank, and deposited with appellant Smith, a member of the firm of C. Hardin & Sons, as collateral security to said firm, and that Mr. Smith afterward filled the blank with the name of Herman Dolph as trustee, and delivered the certificates to him. Appellant Smith claims that, at the organization of the Shaver Wagon Company, W. T. Shaver transferred to the company his entire plant and business as a manufacturer, including the book accounts, etc., valued at ninety-nine thousand, four hundred dollars, for which he was to receive nine hundred and ninety-four of the one thousand shares of the capital stock of said company; that the certificates in question were issued to Mr. Shaver in pursuance to that agreement, and were fully paid for by the transfer of the property. Appellee contends that the property was not worth to exceed forty-four thousand, five hundred dollars; that it was taken at its value; that the company assumed certain liabilities for Mr. Shaver, and that he was only entitled to two hundred shares of the capital stock in return for his property.

Our examination of the evidence leads us to the conclusion that the value of the property transferred by Mr. Shaver to the wagon company did not exceed forty-four thousand, five hundred dollars; that the company did assume about thirteen thousand, seven hundred dollars of Mr. Shaver's indebtedness, a great part of which was a lien upon the property; and that Mr. Shaver was only entitled to two hundred shares capital stock as additional compensation for his property. The subscriptions to stock were as follows: W. T. Shaver, two hundred shares, twenty thousand dollars; E. Eastabrook, one share, one hundred dollars; W. J. Brooks, one share, one hundred dollars; W. A. Greer, one share, one hundred dollars; Joseph Edgington, three shares, three hundred dollars; and W. T. Shaver, seven hundred and ninety-four shares, seventy-nine thousand, four hundred dollars. Mr. Shaver's account with stock shows that certificate number 1 was issued to him in 1882 for two hundred shares, and that on July 17, 1882, certificates numbers 6 to 21, inclusive, aggregating five hundred and ninety-four shares, were issued to him, and that, of these, he transferred, July 20, to Edgington, certificate number 10, for three shares; July 21, certificates 18 and 19, twenty shares, to J. B. Fish; and July 17, certificate number 21, one hundred shares, to appellant Smith. It will be observed that certificate number 1 was for the full amount of shares to which we find Mr. Shaver was entitled. There is evidence tending to show that certificate number 1 remained attached in the certificate book for some time, but it is not shown what ultimately became of it, and we find nothing in the books to show that it was ever canceled, or that any of the certificates subsequently issued to Shaver were on account of the two hundred shares to which he was entitled. It is claimed, and we think, correctly, that the seven hundred and ninety-four shares subscribed by Shaver were not paid for,

but were so subscribed for the purpose of having the shares issued to Shaver to be more conveniently held and disposed of by him for the benefit of the company. Appellant Smith's certificate number 24 is not derived from the two hundred shares to which Shaver was entitled, nor is any part of the sixty-two thousand dollars par value held by Mr. Dolph as trustee. We think it is entirely clear, under the evidence, that no part of these shares of stock was ever paid for, and that Mr. Smith knew this fact at the time he received the certificates. He was intimate with the business of the wagon company from the beginning, and served as its president during the greater part of its active existence. At the time at which certificate number 21 was transferred to appellant Smith, he gave to Shaver his check for five thousand dollars and at the same time, or immediately thereafter, received from Shaver his check for the same amount. The only reason given for this is by Mr. Smith, who says: "The object was so that Shaver could keep from his bookkeeper an exact knowledge of the transaction between him and Hardin & Sons." We are inclined to think that it was to make it appear that Smith had paid Shaver for the stock represented in certificate number 21, though we confess that the purpose is not entirely clear to our minds.

Question is made whether a party holding unpaid stock as collateral security can be charged thereon. It appears in evidence that the certificates for sixty-two thousand dollars par value deposited with Mr. Smith were voted by him, and after the transfer, by Mr. Dolph as shares owned by them. It does not appear that the wagon company ever consented to the transfer of these certificates as collateral security, nor that the holders under the transfers treated them as other than their own property. Whatever may be the liability of the holder of unpaid shares as collateral security, we con-

clude that, under the facts of this case, the appellant, Smith, should be charged upon these shares in favor of appellees; he having received them, knowing that they were not paid for, and having treated them as his own.

VII. In addition to the three shares subscribed and paid for by the appellant Edgington, it appears that on July 20, 1882, Shaver transferred to him certificate number 10 for three additional shares, said certificate number 10 being for part of the seven hundred and ninety-four shares held by Shaver for the benefit of the company. Mr. Edgington admits in his testimony the receipt of this certificate, and that he never paid anything for it. He disclaims any agreement to pay for it, and claims not to have understood why it was given to him, unless it was an arrangement to give to each subscriber double the amount of stock that he had actually paid for. Mr. Edgington has continued to hold this stock, and to allow it to stand in his name upon the books of the company, without offering to return the certificate or disclaim ownership thereof. In view of his relation to the company, and the facts attending his receipt and retention of this certificate, which, as we have seen, was unpaid for, we think he should be held to owe the company therefor, and to be liable to the plaintiff, as found by the district court. Appellant Edgington contends that, as his counterclaim was not denied, he was entitled to judgment thereon. In his counterclaim he asked to recover upon the promissory note mentioned above, which the plaintiff executed to Mr. Shaver. By the indorsement thereon, that note is not to be paid until the Shaver Wagon Company's note, upon which plaintiff's judgment was taken, is paid. The counterclaim failed to show a cause of action, and hence appellant Edgington was not entitled to judgment thereon. We conclude that the judgments rendered by the district court are correct, and should be **AFFIRMED**.

LYCOMING RUBBER COMPANY *et al.*, Appellants, v. KING
& MILLETT *et al.*

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Fraudulent Conveyance: MORTGAGE FOR EXCESSIVE AMOUNT. A mortgage by an insolvent mortgagee, supposing that mortgagors were considerably indebted, but not knowing their actual condition, given to a creditor upon substantially all the debtor's property subject to execution, for more than is owing, neither party to the mortgage knowing exactly what is due, which mortgage includes debts to others which the mortgagee was compelled to assume in order to obtain the mortgage, is not fraudulent as to other creditors where it is indorsed on the note given that the mortgage should secure such sums only as might be actually due during the life of the note, and where there is no intent to hinder other creditors. *King v. Gustafson*, 80 Iowa, 207, *distinguished*.

Appeal from Hamilton District Court.—HON. S. M.
WEAVER, Judge.

MONDAY, FEBRUARY 5, 1894.

ACTION in equity to have set aside as fraudulent a certain chattel mortgage, and to subject the mortgaged property to the payment of judgments owned by plaintiffs. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiffs appeal.—*Affirmed*.

Wesley Martin and *George Wambach* for appellants.

J. L. Kamrar for appellees.

ROBINSON, J.—On the fourteenth day of December, 1889, the defendants King & Millett made to their codefendant the Letts-Fletcher Company a note for the sum of six thousand, two hundred and eighty dollars and twenty-seven cents, payable on demand, and, to secure its payment, executed a chattel mortgage on the stock of merchandise and trade fixtures and appurtenances of the mortgagors, then located in the town of Jewell Junction, and also on all their book

accounts. The mortgage provided for a sale, on notice, in Jewell Junction in such manner as the mortgagee should consider for the interest of the parties to the mortgage. A day or two after it was given the mortgagee took possession of the mortgaged property, and commenced to sell the merchandise and to collect the accounts. The plaintiffs claim that the mortgage is fraudulent as to them, for the reason that it was given to secure a larger amount than the mortgagors were owing, and that it was intended to secure two creditors besides the mortgagee, and was, in effect, a general assignment with preferences, and, therefore, void. The plaintiffs ask that the mortgage be decreed to be fraudulent and void, and that the mortgagee be held as trustee of the property for their benefit.

I. The evidence shows the following facts: King & Millett were engaged in selling merchandise at Jewell Junction from the year 1883 until the mortgage was given. During most, if not all, of that time, they purchased goods of the Letts-Fletcher Company, a wholesale dealer at Marshalltown. They made payments on their purchases from time to time, but were owing to the company about four thousand, six hundred dollars when the mortgage was given. That amount was composed of twenty promissory notes, which had been given at different times, and an open account. All of the notes but one had been deposited in bank at Marshalltown, and credit for them given to the company. A mortgage on some buildings had been given to secure the company, but it was not satisfied with that security, and payment of their claims, or more satisfactory security, was demanded. Mr. Letts, for the company, visited King & Millett twice to obtain a settlement, but did not have a statement of the notes and account with him, and could not readily ascertain the indebtedness of the firm from its books. He computed the amount due from such information

as he had, and by that means found it to be, as he supposed, about five thousand, seven hundred dollars or five thousand, eight hundred dollars. King & Millett refused to give new security, unless the company would assume and agree to pay two bills which they were owing, which amounted to four hundred and sixty-one dollars and sixty-six cents. Letts finally assumed their payment for the company, and took the note and mortgage in controversy for the amount of those claims and the amount supposed to be due his company, but indorsed on the note the following: "This note is given and accepted as collateral security for any account or notes now owing Letts-Fletcher Company by King & Millett, or that they may owe during the life of this note, and there shall be no more due on this note at any time than is due on the account or notes for which this note is given as security." The mortgage on the buildings was surrendered when the new mortgage was executed. That included substantially all the property subject to execution which was then owned by the firm of King & Millett, but King had some property in his own right, which was not mortgaged. At the time of this transaction King & Millett were insolvent. The company knew or supposed that they were owing considerable amounts to various creditors, but did not know their actual condition. It has sold about all the personal property which was mortgaged, and has collected a portion of the accounts, but several hundred dollars are yet due on its claims. The giving of a note and mortgage by an insolvent debtor for an amount larger than that which he really owes is a badge of fraud if unexplained, but we think it has been fully and satisfactorily explained in this case. It was the right of the Letts-Fletcher Company to protect itself, even though by so doing it defeated the collection of claims of other creditors; and, had it known that King & Millett were

insolvent, the knowledge would not have affected that right, so long as they exercised it in good faith. The assuming of the claims of two other creditors under the circumstances of the case was not fraudulent, but an entirely proper business transaction, necessary to enable the company to obtain the security it desired. There was no intention to hinder, delay, or defraud, and by assuming the payment of the claims it made the indebtedness of King & Millett for them its own, and was entitled to indemnity on account of it. The case is unlike that of *King v. Gustafson*, 80 Iowa, 207, and other cases relied upon by appellants. A careful examination of the record fails to disclose any element of fraud in the transaction in controversy. The taking of a note and mortgage for a larger sum than the debtors were owing was the result of a want of accurate knowledge of the amount due, and was without any wrong intent, and has not prejudiced any one. In our opinion, the decree of the district court is right, and it is **AFFIRMED**.

GUST. A. LEHMANN V. L. H. RINEHART *et al.*, Appellants.

Highway: Sufficiency of Petition to Give Board Jurisdiction.

A petition asking that a highway described, "be ———," and which in no way indicates the relief desired, does not confer jurisdiction to establish a highway upon the board of supervisors. Code, 922; *McCollister v. Shuey*, 24 Iowa, 363; *State v. Pitman*, 38 Iowa, 252; *Stevens v. The Board*, 41 Iowa, 343; *Harris v. The Board*, 55 N. W. Rep. 324; *State v. Barlow*, 61 Iowa, 572, and *Curtis v. The County*, 72 Iowa, 151, distinguished.

Appeal from Iowa District Court.—HON. S. H. FAIRALL,
Judge.

MONDAY, FEBRUARY 5, 1894.

PROCEEDING to test the jurisdiction of defendants, as supervisors of Iowa county, to establish a highway.
—*Reversed*.

J. T. Beem, County Attorney, and *Hedges & Rumble* for appellants.

D. H. Wilson for appellee.

KINNE, J.—I. Plaintiff filed his petition in the district court for a writ of *certiorari* against the defendants, as supervisors of Iowa county, requiring them to certify to that court a transcript of the records and proceedings touching his application for the establishment of a certain public highway. The writ issued, a return was made thereto, and, on the hearing had before the district court of Iowa county, it was ordered that the finding of the board that it had no jurisdiction be annulled, and that said board proceed in said proceeding for the establishment of said road, as asked by plaintiff, and that the defendants pay the costs. From this ruling and order, defendants appeal.

II. The petition presented to the auditor was as follows: "To the Board of Supervisors of Iowa County: The undersigned ask that a highway, commencing at (commencing at) the southeast corner of the northwest quarter of the northwest quarter of section 30-81-11, and running thence west thirty-two (32) rods, to the public highway known as the 'Glenwood Road,' running north and south, and terminating then at the point above stated, be ——. Dated February 11, 1891. [Signed by] Gust A. Lehmann and Thirty-Six Other Household-ers." With this paper there was filed a bond, which was approved by the auditor. This bond was conditioned as by law required. June 29, 1891, the auditor appointed a commissioner to examine into the expediency of establishing said highway, and he afterward reported in favor of the same. Due and legal notice was given of the filing of this report. Thereafter thirty persons presented a remonstrance against the location of said highway. At the September ses-

sion, 1891, of the board of supervisors, the matter came on for hearing, and, after hearing the parties, the board decided that it had no jurisdiction. On the hearing of the *certiorari* proceeding before the district court, this adjudication of the board was set aside, and it was ordered to proceed in the case. The only question presented in this record is the sufficiency of the petition to invoke the jurisdiction of the board of supervisors. The petition is in the form prescribed by statute, except that it asks no relief whatever. It may be conceded that such a petition is sufficient if it follows the statutory form in substance, "expressing with reasonable certainty the action desired." We have held that a petition which asks "the appointment of a commissioner to open a road" is sufficient, as a substantial compliance with the statute (*McCollister v. Shuey*, 24 Iowa, 363); and the same doctrine was approved in *State v. Pitmam*, 38 Iowa, 252, *Stevens v. Board*, 41 Iowa, 343, and *Harris v. Board*, 55 N. W. Rep. (Iowa) 324. It was held, in the last case cited, that a petition was sufficient which asked for "a change in the road," describing the proposed line, and asking that it "be vacated and abandoned, or that the said old road be vacated, only, and no change made or new road established, and that a commissioner be appointed to view the proposed change of road." In *State v. Barlow*, 61 Iowa, 572, 16 N. W. Rep. 733, a petition addressed to the auditor, and describing the road, and stating that it was much needed, and asking for the appointment of a commissioner to examine into the expediency of establishing such road, was held sufficient, though it did not in terms ask for the establishment of a road. The court said: "But the object of the petition is abundantly evident. It is stated that the road was much needed, and it asked for the appointment of a commissioner. This could have been done only with a view to the establishment of the road." It will be observed

that, in the cases cited, the petitions contained statements not found in the one in the case at bar. We can not see how the petition in this case can be held to confer jurisdiction on the board to act. It neither asked for the establishment, vacation, nor alteration of a highway. In fact, it asked for nothing. It did not request the appointment of a commissioner. It contained no statements touching the necessity for a highway over the route described. It was absolutely silent as to the relief sought. So far as the form of the petition is concerned, it applied equally to a case of establishment, vacation, or alteration. It failed to express the action desired. We fail to find any case in which it has been held that the petition for the establishment of a highway was sufficient when it contained nothing indicating the nature of the relief sought. We concede that, in these preliminary steps for the establishment of highways, the law should be liberally construed; and a mere technical failure to comply with prescribed forms, when it is clear from the form used what is desired, should not prevent carrying out the manifest intent of the petitioners. But, as we have said, there is no language used in this petition which indicated what, if any, relief the petitioners desired. It is not a substantial compliance with the statute. Code, section 922; *Curtis v. Pocahontas County*, 72 Iowa, 151, 33 N. W. Rep. 616. The presenting of a petition asking for the establishment of a highway is necessary in order to confer jurisdiction on the board of supervisors to establish the same. *Curtis v. Pocahontas County*, *Id.* This establishment need not be asked in terms, but there must be something in the petition which clearly indicates the relief sought, else jurisdiction to act is not conferred upon the board. In this respect the petition in the case at bar is fatally defective. We think the district court erred in overruling the action of the board of supervisors, and its judgment is REVERSED.

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ALICE ARYMAN v. THE CITY OF MARSHALLTOWN,
Appellant.

Personal Injury: Complaints to Physician. Complaints of pain made to a physician at various examinations of an injury are admissible under the rule which admits statements needed to aid the surgeon in examining his case, and the admission is, at all events, harmless, where it is self-evident and unquestioned that pain existed. (1)

REFUSING NEEDLESS PROOF. It is not error to refuse letting a defendant prove what the plaintiff has already shown and about which there seems to be no dispute. (1)

Refusing Instructions Already Covered. It is not error to refuse instructions where, so far as they state the law correctly, they are fully covered by the charge of the court. (2)

Appeal from Marshall District Court.—HON. S. M. WEAVER, Judge.

MONDAY, FEBRUARY 5, 1894.

ACTION to recover for personal injuries, sustained, as is alleged, by reason of defendant's negligence in permitting one of its sidewalks to be and remain in a dangerous condition. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

O. Caswell and *B. F. Cummings* for appellant.

J. L. Carney and *B. L. Burritt* for appellee.

GIVEN, J.—I. Appellant assigns as errors certain rulings of the court in taking testimony. The surgeon who attended the plaintiff was permitted to testify over defendant's objection that on the first examination the plaintiff complained of pain, and that at another examination she complained of pain on the outside of her leg. There was no prejudice in admitting these

statements, even though they were incompetent, for it was only stating that which was self-evident and unquestioned. There is no question but that the plaintiff did have an injured or diseased toe joint that must certainly have caused her pain. The statements were admissible under the familiar rule that admits statements of the patient made to the physician or surgeon which are necessary to aid him in his examination of the case. There was no error in permitting plaintiff to show the condition of the sidewalk in the vicinity of the alleged accident, as that evidence was admissible as tending to show notice to the defendant, and must have been so considered under the instructions of the court. Appellant complains that it was not permitted to show on cross-examination "that the walk testified to in chief was openly and notoriously out of repair." We discover no prejudicial error in this ruling, as, by the questions, appellant was seeking to prove that which was claimed and proven by the plaintiff, and about which there seems to have been no dispute.

II. Appellant asked two instructions as to the care that plaintiff was required to exercise, and that a failure to exercise that care would be contributory negligence. The subject-matter of these instructions, so far as they state the law correctly, was fully embraced in those given by the court; hence there was no error in refusing them. We discover no error in the record, and the judgment of the district court is, therefore, **AFFIRMED**.

E. Y. ROYCE v. TOWN OF APLINGTON *et al.*, Appellants.

Void Sidewalk Tax: Sale en Masse. Ordinances directed that sidewalks should be built upon resolution of the council which should levy a tax upon abutting lots, that on failure to repair walks after notice by the street commissioner, the latter should repair at owner's expense, that the commissioner should return delinquent assessments to the town treasurer who was to certify such to the county treasurer for collection, under Code, 481. Out of a large number of plaintiff's lots which were sold for such assessments for sidewalks built, but three were covered by a resolution to build. The auditor listed lots not listed by the treasurer, and listed all charged against plaintiff's lots in a given block as a single tax against all his lots in that block, whether certified or not, and all lots were sold together as listed. *Held*, that the lots should have been sold separately and that, owing to all of said irregularities, the sale was void *in toto*.

Appeal from Butler District Court.—HON. G. W. RUDDICK, Judge.

MONDAY, FEBRUARY 5, 1894.

ACTION in equity to have set aside the sale of certain lots made on account of a sidewalk tax, and to have the tax declared to be void. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendants appeal.—*Affirmed*.

J. H. Scales for appellants.

Hemenway & Grundy for appellee.

ROBINSON, J.—The plaintiff is the owner of certain lots in the incorporated town of Aplington, which were sold on the twenty-first day of December, 1891, by the treasurer of Butler county, for the payment of a sidewalk tax levied in the year 1889, under an alleged authority derived from the town. The plaintiff claims that the sale and tax were illegal for various reasons,

among which are the following: That the town council never ordered any walk to be built adjoining the lots; that no notice was given of any order or requirement to build the walk; that no order was ever made by the council assessing any charge against the lots; that the walks were not built according to any provision of the ordinances of the town or laws of the state; that the council never gave any legal authority to the recorder of the town to certify such a tax; that the building of the walk was without authority; and that the sales were without authority, and are invalid. The district court set aside the sale and assessment upon which it was made. On the fifth day of March, 1889, the town council adopted a resolution which required the construction of a sidewalk "commencing at the northeast corner of lot 1, block 32, and running west to the northwest corner of lot 7 in block 32." It provided that "the expense of said sidewalk be assessed to the lots or parcels abutting thereon. Said sidewalk to be constructed within thirty days after posting notices of the same." There is some confusion in the record submitted to us, but we gather from it that there are fourteen lots in block 32, and that the sidewalk was ordered to be built in front of lots 5, 6 and 7 in that block, owned by the plaintiff. We find no resolution in regard to constructing sidewalks excepting the one specified. But of the lots of plaintiff sold for a sidewalk tax seven were lots in block 15, four in block 16, lots 8 to 14, inclusive, in block 32, twelve lots in block 33, and the east half of four lots in block 75. In addition there is a sidewalk tax upon one lot in block 11, one in block 12, and one in block 38, which do not appear to have been sold. Lots 1 and 2 in block 32 were sold for a sidewalk tax, but do not appear to be claimed by plaintiff. It is said that some of the lots were taxed for the construction and others for the repair of sidewalks, and the evidence shows that "the

street committee" reported in June, 1889, "that they had condemned certain sidewalks, and ordered the street commissioner to have them repaired." In January, 1889, the council directed that "the mayor, secretary and street commissioner take treasurer and look over sidewalks, and see that the taxes are properly charged up to the respective owners, and that said committee attend to this before the March meeting of this body, and so report." In March the committee reported that "there was expended for sidewalks, as directed by the committee on streets and alleys," specified sums on lots which were described, including lots 5, 6, 7 and 14 in block 32, and four lots in block 75, of which plaintiff owns the east half. An ordinance of the town provides that the council may, by resolution, cause sidewalks to be constructed, and levy a special tax on the lots fronting on them to pay the expense of the walks. It also makes it the duty of the owner of such lots to keep the sidewalks in repair, and authorizes the street commissioner to notify the lot owner when a walk for which he is responsible is defective, and to repair it, if the owner does not, at the cost of the owner. Another ordinance requires the street commissioner to return to the town treasurer a list of delinquent assessments and charges authorized by ordinance. The treasurer is required to enter in a sidewalk tax book a memorandum showing the amounts assessed against all town lots for building sidewalks, and to certify to the county auditor for collection, as authorized by section 481 of the Code, all delinquent and unpaid charges entered in the sidewalk tax book. It appears in this case that the town treasurer made three certificates in relation to delinquent taxes, upon which the taxes in controversy were levied. The first one showed an amount of tax alleged to be delinquent against one lot in block 15, four lots in block 16, one lot in block 32, and two lots in block

33, which plaintiff owns, and four lots in block 75, of which he owns the east half. The second certificate shows delinquent taxes against two other lots in block 32 which are owned by plaintiff, and the third certificate shows such taxes against the four lots in block 75 already referred to, the tax against three of them being aggregated. The last certificate was made in October, 1890. It further appears that the county auditor listed six lots in block 15, seven lots in block 32, and ten lots in block 33, which were owned by the plaintiff, but not certified by the town treasurer; and that he listed the aggregate of the taxes certified on the lots of plaintiff in each block as a single tax against all the lots owned by plaintiff in that block, whether certified to him or not, and all the lots in a block were sold together as listed. No reason is shown for the listing and sale of two or more lots together. That they were not so listed by the town is shown by the certificate of its treasurer first made, although in the third certificate three of the lots were certified together as subject to one tax. If the taxes were duly levied by the town, each lot should have been listed and sold separately for the tax levied upon it. All the lots in controversy are subject to the objection that they were listed by the county auditor and sold by the county treasurer in mass, although the certificates showed that they were taxed separately. A further objection to the sale of the east half of the four lots in block 75 is that it was made for taxes which were certified, not as on the part sold, but as on the whole of all the lots. The sale of lots on which no taxes had been levied can not be defended upon any ground. The petition alleges that the taxes in controversy were levied for the construction of sidewalks, and the answer admits that allegation; but it is not shown that the council ordered the construction of sidewalks, excepting that in front of seven lots in

block 32. The report of the committee on sidewalks shows taxes levied against but few of those in controversy, and the amount of expenses returned against most, if not all, of such lots, indicate that the sidewalks were rebuilt, and not merely repaired. The irregularities in the various proceedings which terminated in the sale were so gross that we do not think the listing and sale of any of the lots should be sustained.

It is said that some of the objections to the sale urged in argument are not presented by the pleadings. It is true that some of them are not explicitly pleaded, but, in view of certain general averments in the petition, and amendments thereto, and the evidence submitted, we are of the opinion that the objections upon which our conclusions rest should be regarded as made in the case. Other objections are referred to by counsel, but, as they are of an important character, and are not very fully presented in argument, we deem it best not to consider them upon their merits. For reasons stated, we conclude that the taxes as they were placed upon the county tax list, and the sales, were illegal, and that they must be set aside. The decree of the district court is AFFIRMED.

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L. A. BRITSON V. L. J. TJERNAGEL, JOHN SWAN AND
THE CITY NATIONAL BANK, Appellants.

Wrongful Attachment of Land: Damages. A counterclaim for damages by reason of a wrongful attachment of land should not be submitted to the jury where no damage is proven. (2)

Misconduct of Counsel: Bill of Exceptions. Misstatements in argument of counsel can not be reviewed on appeal unless preserved by bill of exceptions. Affidavits filed in the trial court will not be considered. (3)

Newly Discovered Evidence. Where there is a conflict as to the existence of newly discovered evidence which is largely cumulative, the discretion of the trial court in refusing a new trial will not be interfered with. (4)

Appeal from Story District Court.—HON. S. M. WEAVER,
Judge.

MONDAY, FEBRUARY 5, 1894.

ACTION at law to recover the sum of two hundred dollars which plaintiff alleged he deposited with the defendant bank. The defendants denied that the alleged deposit was made. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendants appeal.—*Affirmed.*

J. F. Martin for appellants.

Funson & Gifford for appellee.

ROTHROCK, J.—I. The Citizens' Bank, defendant, is located at Story City, and is owned by the defendants Tjernagel and Swan. In 1891 the plaintiff was engaged in the hardware business at a village named Roland, a few miles from Story City, and he did his banking business with said bank. He claims that he delivered to the defendant Tjernagel the sum of two hundred dollars in currency, at Roland, to be deposited in the bank, and that he received no credit for said money. There is no question made as to the sufficiency of the evidence to authorize a verdict for plaintiff.

II. When the plaintiff commenced the action he sued out a writ of attachment on the ground that the defendant Tjernagel was about to remove permanently out of the county, and had property not exempt from execution, which he refused to apply to the payment or securing of the debt due to the plaintiff, and that he was about to convert his property into money for the purpose of placing it beyond the reach of his creditors. The attachment was levied upon eighty acres of land. The defendant Tjernagel filed a counterclaim, in which he demanded damages of the

plaintiff for wrongfully suing out the attachment. The counterclaim did not deny the grounds of the attachment set out in the petition. It was based upon the ground that the attachment was wrongfully sued out, because there was no indebtedness due from the defendants to the plaintiff. When the case was submitted to the jury the court withdrew the counterclaim from the consideration of the jury. It is claimed this action of the court was erroneous. We think the ruling of the court was correct upon the ground that there was no competent evidence of any damages by reason of the attachment. There was no evidence that the defendant was in any way damaged by the levy of the attachment upon his land.

III. The defendants filed affidavits which tended to show that plaintiff's counsel, in his argument to the jury, made false statements, which were not warranted by the evidence and which were greatly to the prejudice of the defendants. A new trial was asked on account of this misconduct. We think the court rightly overruled the motion on this ground. It does not appear that these affidavits were made part of the bill of exceptions. Where misconduct of an attorney in argument is relied on for reversal on appeal, it should be shown by bill of exceptions, and not by affidavits filed in the trial court. *Rayburn v. Railway Co.*, 74 Iowa, 637, 35 N. W. Rep. 606, and 38 N. W. Rep. 520; *Hall v. Carter*, 74 Iowa, 364, 37 N. W. Rep. 956; *Fowler v. Town of Strawberry Hill*, 74 Iowa, 644, 38 N. W. Rep. 521.

IV. A new trial was asked upon the ground of newly discovered evidence, which was supported by affidavits. The affidavits as to alleged newly discovered evidence were, for the most part, contradicted by counter affidavits filed by the plaintiff. Much of the newly discovered evidence was cumulative, and, in our

opinion, the court did not abuse its discretion in refusing a new trial for this cause. The judgment of the district court is **AFFIRMED**.

F. W. GARSTANG, Appellant, v. THE CITY OF DAVENPORT, Defendant; PAULINE KRUMBHOLTZ, Intervener.

90	359
116	193
90	359
1136	376

Passage Way: ESTOPPEL TO DENY EXISTENCE. Where a grantor conveys land, bounding it on a way or street, he and his assigns are estopped to deny that there is such a street or way. Such words are an implied covenant that the way exists.

Adverse Possession. Where a lot is conveyed as bounding on a described, "alley to be laid out," and subsequently, the remainder of the block is deeded, the grantee in the last deed has no color of title to said alley, and his possession of it, no time for opening the alley being fixed in the first deed, is not adverse to the grantee in said first deed.

Appeal from Scott District Court.—HON. C. M. WATERMAN, Judge.

MONDAY, FEBRUARY 5, 1894.

ACTION to enjoin the opening of an alley in the defendant city. The intervener claims the alley as appurtenant to a lot owned by her. The district court dismissed the petition of plaintiff and the answer of defendant, and gave judgment establishing intervener's right to the ally. The plaintiff appeals.—*Affirmed*.

John H. Helmick for appellant.

Schmidt & Vollmer for intervener.

GRANGER, C. J.—I. The following plat will indicate the alley in dispute:

It is the part of the twenty-foot alley lying between Harris street and the school lot. It has never been opened. The part of the alley east of Harris street was established by deed, or other proceedings on the part of the city, and it adopted an ordinance to open the entire alley from Ainsworth street to the school lot, relying for its right, as to the part now in dispute, upon conveyances by one Houghton, who owned all the land east of the school lot as far as that marked on the plat, to Anna Garstang. Houghton deeded the Schultz lot, in the northeast corner, to her (Anna Garstang), and the Pauline Krumbholtz lot, in the northwest corner, to one Crowell, who deeded to Pauline Krumbholtz. In the conveyances the lot is described by metes and bounds, as follows: "A part of lot number two (2), in section number thirty-four (34), in township number seventy-eight (78) north, of range number (3) east of the fifth P. M., more particularly described as follows, to wit: Beginning at a point in the southern boundary line of Third street, in the city of Davenport, being the northwest corner of land conveyed to Richard Houghton by Theo. P. Green; thence south along said Houghton's west line one hundred and fifty (150) feet to a twenty (20) foot alley, to be laid out; thence east forty-three (43) feet; thence north one hundred and fifty (150) feet, to Third street; thence west, along Third street, forty-three (43) feet, to the place of beginning." The deed from Crowell to Pauline Krumbholtz was made October 19, 1881. Houghton conveyed the balance of the land to the plaintiff in 1887. In specifying the exceptions, from a description of all the original tract, the Krumbholz lot is described by metes and bounds, substantially as before, using the words, "one hundred and fifty feet, to a twenty-foot alley, hereafter to be laid out." It is because of these words in intervener's deed from Crowell, and also the deeds to Crowell and plaintiff

from Houghton, that she claims the alley as appurtenant to her lot. We think the claim of intervener is well supported by authority. We do not think it open to serious dispute that the deed to intervener contemplated the laying out of an alley as the southern boundary of the lot. In *Parker v. Smith*, 17 Mass. 411, it is said: "The principal question in this case arises upon the construction of the deed from John Russell to Benjamin Faber, in which he conveys a piece of land in what is now the town of New Bedford, bounding it southwardly and westwardly on a way or street. By this description the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets." See, also, *Thomas v. Poole*, 7 Gray, 83. In *Tufts v. City of Charleston*, 2 Gray, 271, the syllabus states the rule as follows: "A deed of land bounding on a passageway two rods wide, which is to be laid out between the premises and land of A, the grantor to make and maintain all the fence between the said contemplated passageway and premises, estops the grantor, and those claiming under him, to deny the existence of the passageway." In the opinion it is said: "When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way." We think the entire current of authorities is with this view.

II. Appellant urges that intervener's claim to the alley is barred by the statute of limitations because of more than ten years' adverse occupancy. At the time of the conveyances by Houghton the land conveyed to Crowell, being the Krumbholz lot, and that afterwards conveyed to plaintiff, was inclosed, and it has continued so to be to the present time. The plaintiff, in

giving in his block or tract of land for assessment, has not excepted the twenty-foot alley therefrom, but the whole has been assessed, and taxes paid thereon. The plea of the statute of limitations is not sustained. The occupancy by Houghton after the deed in 1881, as to the alley, was not adverse. The alley was to be opened, but no time was specified. Not a single fact, as between Houghton and Crowell or Houghton and Mrs. Krumbholz is relied on to put the statute in operation. A mere neglect to perform his agreement would not have that effect, and this was all there was up to 1887, when he conveyed to the plaintiff. Plaintiff is in no better position, for at that time, in the conveyance which he took, there is, in legal effect, an exception in the grant to him of this twenty-foot alley, for his deed indicates that there has been a prior conveyance, with the alley as a boundary, which, under the authorities, made the alley-way an appurtenance to the lot. From the time of the conveyance to Crowell there has not been a fact on which to base a color of title or claim of right for the operation of the statute of limitations. The judgment is **AFFIRMED.**

GRANT THURSTON V. J. W. LAMB, Appellant.

Amount in Controversy on Appeal to Supreme Court. Where each party claims judgment for just one hundred dollars against his adversary, an appeal will be dismissed for want of jurisdiction. **KINNE, J.,** took no part.

***Appeal from Tama District Court.*—HON. L. G. KINNE,**
Judge.

TUESDAY, FEBRUARY 6, 1894.

ACTION for the recovery of specific personal property, it being for a horse alleged in the petition to be of the value of eighty dollars; and there is a claim for

twenty dollars for wrongful detention. The answer denies the right of the plaintiff to the possession of the horse, and admits that the defendant's claim to the possession of the horse is by virtue of a chattel mortgage, as stated in the petition. The answer contains an averment that the horse is of the value of one hundred dollars. The action was originally before a justice of the peace, and came to the district court on appeal, where the jury returned a verdict for plaintiff; assessing the value of the horse at ninety dollars, and the damages at twenty dollars. The plaintiff remitted "all of said damages," and afterwards the court rendered judgment on the verdict. The defendant appeals.—*Appeal dismissed.*

W. H. Stivers for appellant.

Struble & Stiger for appellee.

GRANGER, C. J.—There is no certificate of the trial judge, and the appellee moves to dismiss the appeal on the ground that the amount in controversy does not exceed one hundred dollars. The motion must be sustained. It is true that the amount is to be "as shown by the pleading." Taking appellant's answer as a guide, the amount is fixed at precisely one hundred dollars. It "does not exceed" that sum. We are then to look to the amount as fixed by the petition. The value of the horse is there fixed at eighty dollars, and the damage at twenty dollars, making precisely one hundred dollars. The same rule applies as to the answer. It is well settled that a party can take judgment for no more than he asks. These parties differ in their averments as to value, but each, if he recovers, is limited to his own prayer for judgment. Plaintiff asks for judgment for the value, as he alleged it. He could not properly have more. No condition could have arisen under the pleading to have justified a

judgment for more than one hundred dollars, exclusive of costs. This seems decisive of this motion. It was the duty of the jury to fix the value of the horse at whatever the testimony might show it, not exceeding the higher amount claimed, so that it might be adopted in the final judgment. The terms of the judgment do not appear in the record, so that we are not advised as to whether the judgment stands for the ninety dollars as value, or not. But, assuming that it does, it is because the right thereto was not brought in question except as to the entire amount. These views render it unnecessary to consider the effect of the *remittitur* as to damage. The motion is sustained, and the appeal DISMISSED.

KINNE, J., took no part.

MARTHA OWEN v. A. K. OWEN, Appellant.

Cruel and Inhuman Treatment Defined. A woman of twenty-seven marries a man of seventy-seven. One is inconsiderate and provoking, the other irritable. Some violence provoked by her conduct is used and once, in self-defense, he pushes her down, bruising her cheek. *Held*, neither is entitled to a divorce. (1)

Violation of Antenuptial Contract. Breaking an antenuptial contract to discharge the duties of a wife, does not authorize a divorce. (2)

Appeal from Allamakee District Court.—HON. W. A. HOYT, Judge.

TUESDAY, FEBRUARY 6, 1894.

PLAINTIFF asks that she be divorced from the defendant on the ground of cruel and inhuman treatment endangering her life, and for alimony. Defendant denies the allegations of cruel and inhuman treatment, and asks to be divorced from the plaintiff on the ground of desertion, and that a certain conveyance of land, executed at his instance, to the plaintiff, be

set aside, and that he be decreed to be the absolute owner of said land. Decree was entered granting a divorce to the plaintiff, and for costs and one hundred dollars attorney's fee, and giving to defendant the use of said land, and requiring him to keep the fences and buildings thereon in good repair. Defendant appeals.—*Reversed.*

Stillwell & Stewart and F. S. Burling for appellant.

Dayton & Dayton for appellee.

GIVEN, J.—I. These parties were married November 22, 1887; plaintiff then aged twenty-seven, having been recently divorced from a former husband, and the defendant, then aged seventy-seven, having had four wives, from three of whom he had separated, and one of whom was then living and divorced. Upon their marriage the plaintiff went to live with the defendant at his home upon the land in question, and they continued to live together until July 12, 1891, when she left him, and they have ever since lived apart. We first inquire whether the plaintiff has established her allegation of such inhuman treatment as to endanger her life. "The ill treatment contemplated by the statute is any course of conduct that endangers, apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by marriage." *Wheeler v. Wheeler*, 53 Iowa, 511, 5 N. W. Rep. 689; *Knight v. Knight*, 31 Iowa, 456. In the latter case this court approvingly quotes the following: "Mere turbulence of temper, petulance of manner, infirmity of body or mind, are not numbered among these (grave and weighty) causes. When they occur, their effects are to be subdued by management if possible, or submitted to with patience,

for the engagement was to take for better, for worse; and painful as the performance of this duty may be, painful as it certainly is in many instances which exhibit a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class of importance. And it is not every slight touching of the wife by the husband, even in anger, which will justify a divorce. If what is complained of as cruelty is the result of the complainant's own misconduct, it will not furnish ground for the proceeding. The remedy is in her own power; she has only to change her conduct; otherwise, the wife would have nothing to do but misconduct herself, provoke the ill treatment, and then complain." It is not required, nor would it serve any good purpose, to here set out or discuss at length the evidence showing the manner in which these parties treated each other. It is enough to say that it shows that, owing to his advanced age, natural disposition, and rather coarse nature, the defendant was easily irritated, and at times exceedingly disagreeable and difficult to get along with. It shows that, while she was probably not unusually ill tempered, she was not as considerate in her treatment of the old man as she should have been, in view of his age and infirmities, and that, instead of endeavoring to soothe his irritable temper, she often provoked him to anger, and to such an extent that on two or three occasions he did use some violence towards her, and on one occasion to the extent of leaving marks of injury upon her person. According to the claim of plaintiff, and her own testimony and that of her two children, the defendant repeatedly knocked her down,—statements that were much modified on cross-examination. We do not think the defendant ever used any greater violence towards her than to push her, and to throw her upon the floor, and at one time to in some way bruise her cheek. At

the time he threw her upon the floor, so that her cheek was bruised, she struck him with a chisel, inflicting something of a wound upon the head, and cutting through his clothing on the arm. What the defendant did on that occasion seems to have been in his own defense. We conclude from the evidence that, if the plaintiff had treated the defendant as it was her duty to do, she would have had no occasion to complain of inhuman treatment, and that the treatment to which she was subjected was largely the result of her own misconduct. The remedy for such treatment was in her own hands, for we are convinced that, if she had forbore from provoking the old man, and had treated him as a wife of her age should have treated a husband of his, she would have had no occasion to apprehend bodily harm. We think the plaintiff has failed to establish her right to a divorce.

II. We next inquire whether the defendant is entitled to a divorce on the ground of desertion. That the plaintiff has willfully absented herself from the defendant since July, 1891, is not questioned, but, to entitle him to a divorce on that ground, the desertion must be without a reasonable cause, and for a space of two years. The desertion alleged occurred within two months prior to the filing of the defendant's cross petition, and does not, therefore, entitle him to a divorce. Defendant alleges an antenuptial contract, by which he agreed to, and afterward did, convey to her the land upon which they lived in consideration that she would marry him, and discharge the duties of a wife during his lifetime, and that, in disregard of her duties as a wife and her obligation under said contract, she had left him, and refused to live with him. The violation of an antenuptial contract is not a ground for divorce under our statute. For the reasons already stated, we conclude that the defendant is not entitled to a divorce as prayed. Our conclusion being that neither party is entitled to a

divorce, it is unnecessary that we consider the questions discussed with respect to alimony and to the land. We think the record demands that we should leave these parties where they have placed themselves, and not put into the power of either to marry again, but leave them at liberty to do as they should, namely, to go together and live in the relation to which they stand pledged by their marriage. The decree of the district court is reversed, and decree will be entered dismissing plaintiff's petition, and also the cross petition of the defendant, and that each party pay his own costs. **REVERSED.**

ALETTA E. JONES, Appellant, v. ANN STORMS et al.

Sale of Wife's Property by Husband: RESULTING TRUST. Where a husband buys property with the proceeds of crops raised by him on the land of his wife, and of his stock fed on the same, without agreement or expectation that the use of the land should be paid for, there is no resulting trust in the property bought, in favor of the wife, no part of the purchase price having been paid by her in the character of purchaser.

90	369
97	718
90	369
107	874
90	369
111	73
111	74
90	369
116	864

Appeal from Louisa District Court.—HON. A. R. DEWEY, Judge.

TUESDAY, FEBRUARY 6, 1894.

ACTION in equity to establish a resulting trust. Judgment and decree for defendants. Plaintiff appeals. —*Affirmed.*

F. M. Molsberry for appellant.

Jayne & Hoffman for appellees.

KINNE, J.—I. Plaintiff, in her petition, alleged, in substance, the following facts: That she is the widow of A. J. Jones, deceased, who died November 30, 1891, intestate, and that defendants, Ann Storms, Caroline Manning, and Effie Gripple, are the children of said

Jones, and stepchildren of plaintiff. That plaintiff married Jones December 12, 1873, at which time she was the owner of an undivided two thirds interest in certain real estate, in all amounting to about one hundred and sixty-two and one half acres of land. That she also owned certain personal property, consisting of household furniture, two cows and a calf, ten hogs, and quite an amount of crops which had been raised upon said land. At the time of said marriage, Jones had no real estate, but had one hundred and seventy-five dollars in money, a spring wagon, ten hogs, ten sheep, two cows, one calf, and a few farming implements, all of which he brought upon plaintiff's land, which he occupied until his death. That with the proceeds of crops on the land when he went there, and of subsequent crops raised by him thereon, he purchased some stock and agricultural implements. That, from the proceeds of crops and stock raised upon this land from time to time, said Jones purchased certain real estate. She asks that the title to the land so purchased by her husband be decreed to be in her, and that she be decreed to be the owner of one half of the personal property of which Jones died seised, and for other relief. To the petition, defendants interposed a demurrer stating the usual ground in equity cases; also, challenging the sufficiency of the facts stated to constitute Jones a trustee for plaintiff, or to establish a trust in her favor. One ground of the demurrer is that plaintiff's claim is barred by the statute of limitations; also, that the petition fails to show that there is any written evidence of the trust, and that, if plaintiff has any interest in the crops raised upon her real estate, the same is a demand against his estate. This demurrer was sustained, and plaintiff's bill dismissed, at her costs.

II. There is but one question raised by the demurrer which we need determine; that is, do the facts

pleaded show that the deceased, Jones, held the real and personal property in controversy as a trustee, in trust for plaintiff? If not, then the demurrer was properly sustained. Counsel cite many authorities holding that where one gives another money to purchase real estate, and the purchase is made in the name of the latter, that thereby a trust relation is created. There is no real dispute as to the law applicable to cases of resulting trusts. The question is, do the facts pleaded show that that relation existed in this case? Giving the plaintiff the benefit of all allegations of the petition which are well pleaded, we have a case where certain land and personal property were purchased by the husband from the proceeds derived from the sale of crops raised upon land in part belonging to the wife, also from the proceeds of stock raised or fed upon said land. There is no claim in the petition that there was any contract, promise, agreement, or expectation, at the time the husband was thus using his wife's land, that he should render compensation to her therefor. Fairly construed, the petition sets forth a case showing that the husband took and used the real estate of the wife without any expectation of making compensation therefor; and no fact is pleaded which tends to show that, at the time the husband was thus using his wife's property, she expected to receive compensation therefor. Such a state of facts does not establish a resulting trust. Under such facts, without more, no liability existed from the husband to the wife. *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357. Again, a resulting trust can not be established when no part of the purchase money was paid by the person claiming to be the *cestui que trust*. *Burden v. Sheridan*, 36 Iowa, 125. And it would seem that a resulting trust can not be sustained when only a part of the purchase money was paid by the one claiming to be the *cestui que trust*. "The trust must result, if at all, at the instant the deed is taken and the legal title

vests in the grantee. * * * There must be an actual payment from a man's own money, or what is equivalent to payment from his own money, to create a resulting trust, and the money must be advanced and paid in the character of a purchaser." 1 Perry, Trusts, section 133, and notes. In *Andrews v. Oxley*, 38 Iowa, 578, it was held that a conveyance to the wife and child, when the consideration is paid by the husband or parent with his own means, does not create an implied trust, the presumption being that it is done from motives of love and affection. In the light of these, and other authorities that might be cited, the transactions set forth in the petition do not show a trust. Jones did not receive the avails of the proceeds of the land as a fund in any way impressed with a trust character, and in fact these proceeds were in part the result of his own labor, upon which plaintiff could have no claim. Jones came into possession of the proceeds of the real estate, and stock raised upon it, as is fairly inferable from the facts set forth in the petition, as a gift from plaintiff. No facts are pleaded which would authorize a recovery of the sums received by Jones, nor can it be said that by their receipt under such circumstances a trust relation is created. The case needs no extended consideration, and for the reasons given the demurrer was properly sustained. **AFFIRMED.**

GEORGE W. HAEFER, Appellant, v. R. MULLISON *et al.*

Exemptions: Crops on Land Bought with Pension Money.

Crops growing on land bought with pension money are not exempt, at least where it is not shown that the land is a homestead. *Morgan v. Rountree*, 55 N. W. Rep. 65, *distinguished*. (2)

Judgment on Demurrer: Exception to. Where a ruling sustaining a demurrer is excepted to, no exception to the judgment rendered on the ruling is essential on appeal. (1)

90	372
108	706

90	372
126	629

90	372
137	566

Appeal from Fremont District Court.—HON. WALTER I. SMITH and HON. A. B. THORNELL, Judges.

TUESDAY, FEBRUARY 6, 1894.

ACTION on the official bond of a constable, to recover the value of certain corn alleged to have been illegally taken and sold to satisfy an execution. A demurrer to the petition was sustained, and, the plaintiff refusing to plead further, judgment was rendered in favor of the defendants for costs. The plaintiff appeals.—*Affirmed.*

Anderson & Anderson for appellant.

W. E. Mitchell for appellees.

ROBINSON, J.—The petition alleges that the corn in controversy was raised on land in this state which is owned by the plaintiff, and which had been purchased with money he had received as a pension from the general government, and that the corn was exempt from seizure under the execution. The ground of the demurrer was that the petition did not state a cause of action, for the reason that it shows that the corn was not exempt from execution. The demurrer was sustained by the court (Judge SMITH presiding) on the fifteenth day of April, 1892, and to that ruling the plaintiff excepted. On the third day of the next month the court (Judge THORNELL presiding) rendered judgment as follows: "This case coming on for hearing, and the plaintiff electing to stand on his petition without amendment thereto after demurrer sustained, the plaintiff's petition is dismissed, and judgment for costs for defendants." To that judgment no exception was taken.

I. The appellees claim that the appeal can not be considered on the merits, because no exception was

taken to the judgment. The plaintiff does not respond to that claim, but we do not think that it can be sustained. It was held in *Barnhart v. Farr*, 55 Iowa, 366, 7 N. W. Rep. 644, that an exception to the judgment was not necessary, where one had been taken to the conclusion of law upon which it was founded. In *Aldrich v. Price*, 57 Iowa, 155, 9 N. W. Rep. 376, and 10 N. W. Rep. 339, it was held that, where the overruling of a motion which asked for judgment was excepted to, it was unnecessary to except to the judgment afterward rendered, to have it reviewed on appeal. See, also, *Gullihier v. Railway Co.*, 59 Iowa, 419, 13 N. W. Rep. 429. In this case the judgment was founded upon the ruling on the demurrer, and, an exception having been duly taken to that, no exception to the judgment was required, to entitle the plaintiff to a review of the ruling by this court. This conclusion is not in conflict with the cases of *Redding v. Page*, 52 Iowa, 406, 3 N. W. Rep. 427, and *Chapman v. Lobey*, 21 Iowa, 300, cited by appellees.

II. The petition shows that the indebtedness on account of which the execution in question issued was incurred in May, 1889, and afterward. The corn which was taken under the execution had been raised on the land, and was standing in the field, but it is not claimed that it was not matured and ready to be harvested; and, for the purposes of this appeal, it must be assumed that it had ceased to be a part of the land upon which it was grown. The appellant relies upon chapter 23 of the Acts of the Twentieth General Assembly to sustain his claim to the corn. The first two sections of that act are as follows:

"Sec. 1. All money received by any person resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him shall be exempt from execution or

attachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not.

"Sec. 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner, contracted prior to the purchase of such homestead."

In *Diamond v. Palmer*, 79 Iowa, 578, 44 N. W. Rep. 819, it was held that section 1 exempts only the pension money actually invested, and that the claim that it exempts, not only animals in which it is invested, but also the increase of such animals, was too broad. The section, in terms, exempts the money received as a pension, whether it is in the actual possession of the pensioner, or is deposited, loaned or invested by him. It is the money, or that in which it is invested, which is exempt by section 1, and not the proceeds and accumulations of it. Section 2 exempts the proceeds and accumulations, when invested in a homestead. When the land was purchased, and the money was paid for it, the investment was completed. The crops thereafter grown on the land were the products or proceeds of the land and of the seed planted, of the labor performed in raising them, and of the forces of nature which aided in their growth, and were not exempt, as property in which the pension money had been invested. It is proper to state, in this connection, that it is not shown that the land upon which the corn was grown was the homestead of appellant. The petition states that he was the owner of and lived upon certain land in Fremont county, which he purchased with pension money received from the government of the United States, and that the corn had been raised

upon the land. But it is not stated in the petition nor claimed in the argument, that the land was the homestead of plaintiff, nor that he resided thereon when the corn was grown. We can not presume that it was his homestead at that time, and the rule announced in *Morgan v. Rountree*, 88 Iowa, 249, 55 N. W. Rep. 65, is not shown to be applicable to this case. The judgment of the district court is **AFFIRMED**.

E. F. RUNYON v. F. M. HAISLET, Appellant.

Contest over Designation of County Paper, What Is. A "contest" within Code 307, arises whenever more than two certified statements of subscription are filed, and the board can not ignore or defeat such contest by failing to prescribe a time for filing or hearing.

Who Entitled to Designation. Where there are more than two applicants, the board can consider such publishers, only, as have filed certified statements of subscribers, including such as are filed without an order by the board fixing a time for filing; especially where the successful applicant has not asked that such time be fixed. *Corey v. Hamilton*, 84 Iowa, 394, distinguished.

Appeal from Chickasaw District Court.—HON. W. A. HOYT, Judge.

TUESDAY, FEBRUARY 6, 1894.

THE plaintiff is the publisher of the *New Hampton Times*, a weekly newspaper published in Chickasaw county. He applied to the board of supervisors of that county in January, 1892, to have his paper selected as one of the official newspapers of the county, under the provisions of section 307 of the Code. The board ignored that paper, and selected four others. From that action the plaintiff appealed to the district court. After a hearing in that court, judgment was rendered in favor of plaintiff. F. M. Haislet, proprietor of one of the papers selected by the board, appeals.—*Affirmed*.

90	376
95	198
98	5
90	376
111	255
90	376
e138	493

J. W. Sandusky and *T. C. Clary* for appellant.

R. J. W. Bloom for appellee.

ROBINSON, J.—The only action of the board of supervisors in regard to the selection of newspapers shown by the record of its proceedings is as follows: "On motion it was ordered that the *New Hampton Tribune*, *Iowa Free Presse*, *Lawler Dispatch*, and *Nashua Times* be the official papers of the county to publish the proceedings of the board of supervisors of Chickasaw county, Iowa, for the year 1892, and that the said four papers publish said proceedings for the same compensation as two papers are allowed by law to publish same." The appellant was the publisher of the *New Hampton Tribune*. On the fourth day of January, 1892, that being the first day of the session of the board, the plaintiff deposited with the county auditor a certified statement, subscribed and sworn to, which gave the number and names of the *bona fide* yearly subscribers for his paper living within the county, with the postoffice address of each. At a later time, but before the board made any selection, R. H. Fairbairn, publisher of the *New Hampton Courier*, filed with the auditor a similar statement in regard to the *Courier*. Both statements were sealed, and were opened by the auditor at the request of the board, and were examined by it. No other statements were filed, and no day was named by the board for filing them. Mr. Fairbairn was represented before the board by attorney, who presented his claim, and asked that he be heard before the papers were selected. Mr. Haislet was also before the board as an applicant for the selection of his paper, although he did not file a statement; but there was no time when representatives of the papers selected and of those which were unsuccessful applicants were before the board together, and none were present when the matter was

discussed and determined by it. The appellant contends that there was no contest before the board of supervisors, within the meaning of the statute; that the statement of the plaintiff was filed without the order of the board or other authority; that the evidence fails to show that other applicants had notice that statements had been filed; that no charge of fraud was made, and that there was nothing from which plaintiff could appeal. Section 307 of the Code, as amended by chapter 197 of the Acts of the Twentieth General Assembly, contains the following provisions: "The board of supervisors shall, at its January session of each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each deposit with the county auditor on or before a day named by the board of supervisors a certified statement, subscribed and sworn to before some competent officer, giving the names of the several postoffices and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices, living within the county, such statements to be in sealed envelopes and opened by the county auditor upon direction of the board of supervisors to do so, and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers. * * * In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation, and the aggrieved publisher shall have the right of appeal to the circuit (now district) court for redress of grievance."

The pleading filed by the plaintiff in the district court alleges that after the statements were filed the members of the board had a private meeting with some or all of the proprietors of the papers selected, at which it was agreed

that the papers of those publishers should be made the official papers of the county without the filing of the statement required by law, and that the statements of plaintiff and Fairbairn should be ignored; that the failure of the board to name a day for the filing of statements, and the ignoring of those filed, was due to the publishers of the papers selected, and was with their knowledge and consent and by their request. The word "fraud" is not used in the pleading, but fraud is plainly charged. Even if that were not the case, the right of appeal would not be defeated. In *Brown v. Lewis*, 76 Iowa, 159, 40 N. W. Rep. 698, it was held that the right of appeal does not depend upon a charge of fraud. There is little direct evidence that the action of the board was the result of a fraudulent agreement with the successful publishers, although it would be natural to infer from the facts shown that there was some understanding between them and the board. One of the questions we are required to determine is whether the board can prevent a contest by wrongfully omitting to name a day on or before which statements of the applicants must be filed to be considered, when such statements are in fact filed before the selection of newspapers is made. We do not think it can do so. Where there are more than two applicants in a county in which but two can be chosen, the only ones whose claims can be considered by the board are those who filed the statements required by the statute, and we think they may be filed without an order of the board fixing the time for filing. When more than two statements are filed, there is a contest, within the meaning of the statute, and the board can not ignore or defeat it by neglecting to fix a day for the filing of the statements and for a hearing. It is stipulated in the record that appellant was an applicant for the county printing, but from the stipulation and the evidence in the case we understand that he made a verbal application to the

board without filing a statement. He was treated as a contestant, but does not appear to have been aggrieved by the failure of the board to appoint a day for a hearing, and does not appeal from its action. The plaintiff was not prejudiced by that failure, for the reason that his statement was one of the two on file; but, as there were but two, he was entitled to have his paper selected and was aggrieved by the failure of the board to select it, and by its action in selecting others. The conclusions we reach are not in conflict with the opinion in the case of *Cory v. Hamilton*, 84 Iowa, 594, 51 N. W. Rep. 54. What the rights of appellant would have been had he desired the naming of a day for filing statements, we need not determine, for the reason that the case does not involve that question. The appellant makes some objection to rulings on the introduction of evidence, which we have examined, but without finding any prejudicial error. The judgment of the district court is **AFFIRMED**.

**OSKALOOSA COLLEGE V. THE WESTERN UNION FUEL
COMPANY *et al.*, Appellants.**

"Mining Grounds" Construed. The prohibiting of the mining of certain "grounds," in a lease, deals not with the surface only, but everything underneath it. (1)

"Ground East and South," construed. Reserving the ground east and south of a building from mining, precludes mining to the southeast of it within the square lying between the southeast corners of the land lying east and south. (2)

Trespass. A tenant may be liable as for a willful trespass on premises reserved from his lease, and Code, 3332, 3335, defining damages for waste by tenants on leased lands, has no application. (5, 6)

Instructions Construed Together. Where the court expressly construes a lease, the fact that it tells the jury, by way of preliminary statement, what to do if it find a trespass on land, "prohibited by the lease," does not sustain the claim that the construction of the lease was submitted to the jury. (3)

Taking Papers to Jury Room. Defendants asked that a plat and field notes attached and referred to in a deposition, be sent to the jury, to which plaintiff objected unless the whole deposition be sent, which proposition defendant declined, whereupon the court sent the plat only. The notes and the plat contradicted each other. The plat dealt with a material issue and was not introduced independently, but as part of the deposition. *Held*, prejudicial error. (4)

Objection Made too Late. An objection that nothing can be recovered under the petition can not be made for the first time in this court. Code, 2650. (8)

ON REHEARING.

Conflict Between Bill of Exceptions and Notes. Where the bill of exceptions gives in a clear and narrative form what transpired at the trial, it will control an incomplete and obscure report of the shorthand reporter, where the two are inconsistent.

Appeal from Mahaska District Court.—HON. A. B. DEWEY, Judge.

JANUARY 26, 1893.

ACTION against defendants for damages arising from willful trespass, in mining coal on plaintiff's land. Trial to jury. Verdict and judgment for plaintiff. Defendants appeal.—*Reversed*.

J. F. and W. R. Lacey, L. C. Blanchard and Seevers & Seevers for appellants.

Bolton & McCoy and H. H. Sheriff for appellee.

KINNE, J.—I. Defendants are charged with knowingly entering upon the premises of plaintiff, and willfully committing trespass thereon by mining and carrying away coal, and thereby causing the surface of plaintiff's ground to cave in and become otherwise injured. It is also charged that defendant Thomas Seevers had been appointed receiver for the defendant, the Standard Coal Company, and judgment is prayed against all the defendants. Defendants denied the allegations of plaintiff's petition, and affirmatively

averred that the plaintiff had leased and granted to said company the right to enter said premises, and mine and take therefrom coal, for which a certain royalty was to be paid; pleaded that they had fully complied with the lease, and paid the royalty for coal taken; also pleaded settlement had with plaintiff after mining had ceased, wherein plaintiff, with full knowledge of the matters complained of, accepted the royalty on the coal mine, and is now estopped; avers that McNeill acted for the company, and had no personal interest in, or benefit from, said mining, and that some of the defendants took coal beyond or outside the lines described in said lease. A copy of the lease is set out. Plaintiff, in a reply, denied all allegations in defendant's answer.

II. The first error presented arises out of the construction placed upon the lease by the district court. The following provisions of the lease are material to a proper understanding of the question presented: "The Standard Coal Company shall have the right to enter upon the surface of said land (should it be necessary to do so in order to drain or make air courses for the mine, so that the coal can be mined) for the purpose of so draining or ventilating said mine, but shall pay for any growing crop destroyed by such entry. The ground east and south of the building is reserved from terms of this lease; also fifty feet west of college building alongside of said building; *i. e.*, no coal to be taken within fifty feet of building, and the pillars along this last reserve to be left for twenty-five feet further, leaving the pillars standing for seventy-five feet from building. No shaft or machine for raising coal is to be placed on the ground, and no ventilating or water shafts within three hundred feet of said building." In the fourth instruction the court told the jury that the lease gave the defendants no right to enter upon or take coal from the land of plaintiff as follows: "From

any portion included in the east one hundred feet of plaintiff's land; or from any portion lying south of a line running east from the north side of the plaintiff's college building; or from any portion lying east of a line running south from the west side of plaintiff's college building; or within fifty feet of any point from plaintiff's college building." Defendants contend that the construction placed upon the lease by the court was wrong, in this; that the lease did not prohibit mining coal in the excepted territory, but only referred to the "ground," meaning the surface of the earth. They further claim that the exempted ground, as defined by the court, embraces a larger area than do the provisions of exception in the lease. We are clear that the lease was intended to, and did, embrace, not only the surface, but likewise everything thereunder. Any other construction of the contract would permit defendants to mine coal immediately adjacent to, and even under, plaintiff's building, and it is certain, from the contract itself, as well as from the construction placed upon it by the acts of the parties, that the present claim was an afterthought. A more difficult question is to ascertain what land was excepted from the lease. It reads: "The ground east and south of the building is reserved from the terms of this lease; also fifty feet west of college building alongside of said building," etc. Should the words "ground east and south of the building," be held to mean land directly east and directly south of the building, such a construction would leave a piece of land in the southeast corner of the leased grounds which would be neither south nor east of the building, but southeast of it. We think this construction is entirely too technical. To so construe the lease would permit defendants to mine up to the southeast corner of plaintiff's building. We think the construction of the district court was right; that the contract fairly considered, in view of the rules of law applicable thereto,

warrants the instruction given. While the lease must be construed from the language used therein, still it is proper to take into consideration the situation of the parties, the subject-matter of the contract and the acts of the parties thereunder, as showing how they understood the obligations created by the contract (*McDaniels v. Whitney*, 38 Iowa, 60; *Thompson v. Loche*, 65 Iowa, 432, 21 N. W. Rep. 762;), or, as is often said, the writing may be read in the light of surrounding circumstances, in order to more fully understand the intent and meaning of the parties (*Jacobs v. Jacobs*, 42 Iowa, 605). Applying the above rules to this case, it seems to us that the lease was properly construed, and that the acts, circumstances, and situation of the parties tend strongly to show that the construction given to the lease was in accordance with the intent of the parties when they entered into it. Surely, when the construction given clearly effectuates the intent of the parties thereto, it should be carried out, when, as in this case, no violence will thereby be done to the language used in the lease.

III. It is proper to observe that there are over seventy assignments of error in this record. Our duties render it impossible for us to enter upon a detailed discussion of all the questions thus presented. While we have carefully examined them all, yet we can not give any of them extended consideration, save those which impress us as being of controlling importance in the disposition of the case. It is said that the court failed to construe the lease; that the question of its proper construction was in fact submitted to the jury. This contention is based upon extracts of portions of sentences taken from various instructions, and generally from preliminary or introductory clauses, thus: "If you find from the evidence that defendants trespassed on the property of plaintiff, and within that portion prohibited by the lease;" and other similar statements. We must,

however, under the law and in fairness to the trial court, construe all of the instructions together; and, when this is done, it is apparent that the question of the construction of the contract was not submitted to the jury. In the fourth instruction the court explicitly construed the lease, and told the jury what portion of plaintiff's property was exempted from it. In the fifth and other instructions reference is made to such exempt portion of plaintiff's property. It is clear that the jury could not have failed to understand that the court had defined for their guidance the extent of defendants' rights under the lease.

IV. The deposition of one Dunn, a surveyor, was read in evidence, on the part of plaintiff. Attached thereto, and by the interrogatories and answers in said deposition expressly made a part of it, were certain field notes, which accompanied a plat, also a part of the deposition. The plat and field notes, being a part of the deposition, could not be sent to the jury except by the consent of both parties. They were not introduced in evidence independent of the deposition, but as forming a part of it. Code, section 2797. The record shows that, when the jury were about to retire, defendants asked that the Dunn plat and field notes be given to the jury. Plaintiff objected, unless Dunn's entire deposition was given to them. Defendants would not consent to the deposition's going to the jury. The court then had the plats detached from the deposition, and sent them to the jury, but refused to send the field notes. To this action the defendants objected. We think this action was clearly error. Being a part of the deposition, neither the plats nor field notes could be given to the jury unless by consent of all the parties. As this consent was not had, the court had no right to send the plats alone. Nor are defendants precluded from objecting to the court's action in sending the plats

alone, because they asked to have both plats and field notes sent. The main question in the case was as to whether or not defendants had mined coal which they had no right to mine, under the terms of their lease, and hence it was of the utmost importance to locate exactly the rooms which had been mined out. That was the point which Dunn's testimony was largely directed to. That was what the plaintiff sought to establish by his survey plat and notes. Defendants contended that the plat and notes were incorrect. The plat was made from the notes, and defendants introduced evidence which tended to show that Dunn's plat and notes were incorrect, and that the plat did not agree with the notes. The plat tended to show that defendants had mined coal at a point where they claimed they had not done so. Defendants contended that their evidence showed that the plat and field notes did not agree. We think the claim is well founded, and, under such circumstances, it was certainly prejudicial to them to give the jury the plat, and withhold from them the notes from which the plat was made. As we have said, neither the plat nor notes should have been given the jury except by consent of both parties. Nor were defendants bound to submit to plaintiff's proposition to send the whole deposition, or, failing so to do, have the plat sent alone. They were justified in standing upon their legal rights. Plaintiff claims that its case is fully established, independent of the Dunn survey. We think, however, under the circumstances disclosed in the record, we are not justified in assuming that the error was without prejudice to defendants.

V. Counsel claim that the rule of damages in cases of willful trespass ought not to be applied to the coal company, as they insist that the company was not guilty of such trespass. In view of a retrial of the case, it would not be proper for us to comment on the weight or sufficiency of the evidence touching this matter.

We are content with the rule for measuring the damages stated by the trial court. We may properly say that the willful entry, if any, on plaintiff's lands, was not made under or by virtue of the lease. It follows that the situation of the parties with reference to such entry is the same as though no lease had been entered into. In other words, if defendants were willful trespassers on plaintiff's property, the fact that they had a lease of certain other property of plaintiff could have no effect in determining the extent or measure of their liability to plaintiff for the trespass committed.

VI. Claim is made that our statute in relation to willful trespass applies to this case and fixes the damages. Code, section 3332, 3335. These sections apply to tenants where they commit waste on property they have leased, and to certain other parties, but have no application to the case at bar. Appellants were not tenants as to the property on which it is claimed the trespass was committed, nor do they come within the other provisions of the statute.

VII. It is said that plaintiff is estopped because it settled with defendants after knowing that they had taken the coal outside of the ground leased. The claim does not merit extended consideration. The necessary elements of an estoppel are lacking; nor was there any settlement established. Hence there was no error in refusing to submit the question to the jury.

VIII. It is contended that, under the claim made in the petition, there can be no recovery at all. It is too late now to urge this objection. Code, section 2650. For the error heretofore pointed out, the judgment is REVERSED.

TUESDAY, FEBRUARY 6, 1894.

ON REHEARING.—For former report, see 54 N. W. Rep. 152.—*Reversed.*

ROTHROCK, J.—A petition for rehearing was filed in this case at the proper time, and an oral argument was made in support of the petition. The rehearing was granted, and the case has again been presented for our consideration. It is contended by counsel for appellee that the ground upon which the judgment was reversed was founded upon a mistake as to the record made in the court below when the Dunn plat was sent to the jury. This contention must be settled by the record made by the court below. The appellants' abstract sets out what purported to be the record made by a bill of exceptions, signed by the judge, and filed within the proper time. Appellee filed an additional abstract, which contained no denial of appellants' abstract. It is entitled an "Amendment to Abstract." It consists of sixty-eight printed pages, nearly all of which are additions to the evidence as shown by appellants' abstract. Toward the close of the evidence the additional abstract contains the following: "After argument by counsel, the question as to what exhibits should go to the jury came up, and the following entries of objection were made: Plaintiff objects to the plat attached to the Dunn deposition being severed from the deposition and sent to the jury, unless the whole deposition goes to the jury, as said plat is a part of the deposition, was attached to the deposition, came with the deposition, and the deposition refers to it, and makes it a part of the deposition. The plaintiff does not object to sending out the whole deposition, if counsel insists that it is proper to do it, but do object to sending out a part of it without sending out the explanation to it along with it. The objection is over-

ruled, the court finding that the plat submitted is a large plat, two and a half or three feet square; and is ordered to be detached, and is permitted to go to the jury, the same being Exhibits A and C of Dunn's deposition. Plaintiff excepts. Defendants ask that the field notes (Exhibit B) of the Dunn deposition, which refers to and defines Exhibits A and C be sent in. Plaintiff objects to sending the field notes to the jury unless the entire deposition is permitted to go. The field notes are not permitted to go to the jury. Defendants except. * * * This is a copy of the transcript or extension of the shorthand reporter's notes. As the record was presented to us, it was to be considered in addition to appellants' abstract. It is contended that the transcript of the reporter's notes must control. These notes of what transpired at the trial table in reference to what exhibits the jury should take are imperfect. They so show on their face. They appear to be in part the contention of counsel and the result of the court's ruling. They are not clear, but are obscure and imperfect. It appears that the motion for a new trial was overruled on the twenty-third day of March, 1891, and on the same day a bill of exceptions was filed, which, in a clear, distinct, narrative form, gave just what transpired. This bill was signed by the judge. And this court, in determining the case, adopted that as the true record. No claim was made in the appellee's abstract that the bill of exceptions was not correctly set out in appellants' abstract, and no claim is made now that it was not settled and signed by the presiding judge. We think it should be regarded as the true record, and that the incomplete notes of the shorthand reporter must, so far as they are inconsistent therewith, be held to be superseded or controlled by the bill of exceptions. We discover no reason for reaching a different result in the case, and the judgment will stand REVERSED.

**AETNA IRON WORKS V. FIRMENICH MANUFACTURING
COMPANY, Appellant.**

Abatement: Other Action Pending. An action to enforce a lien in which there is dispute as to how much defendant has paid is not abated by the pendency of another action, as to which defendant simply avers that, if it be determined therein that a certain two thousand dollars was applied as a payment, the payments would aggregate seven thousand, five hundred dollars. Such plea merely sets up a fact to be considered in determining how much has been paid.

Variance: Objection too Late. It can not be urged here for the first time, that nothing but an issue not made by the pleadings was tried and determined.

Appeal from Marshall District Court.—HON. S. M.
WEAVER, Judge.

TUESDAY, FEBRUARY 6, 1894.

ACTION in equity to foreclose a mechanic's lien.
From a judgment for plaintiff, defendant appeals.—
Affirmed.

J. L. Carney for appellant.

Binford & Snelling for appellee.

KINNE, J.—I. Plaintiff claimed twelve thousand, one hundred and thirty-eight dollars and interest as a balance due it on account for work done and materials furnished under certain contracts, and for extra work on the glucose factory of defendant at Marshalltown, Iowa. The answer denied that the material was furnished, or labor performed, in accordance with the contract, and denied any indebtedness to plaintiff. In a second division a number of affirmative defenses are pleaded, consisting of failure to perform the contract,

and damages arising therefrom; that much of the material was never furnished; that smaller and lighter beams were used than were contracted for; that the work was improperly performed; that, by reason of plaintiff's negligence, two tanks fell, causing loss and damage; that plaintiff so delayed the work as to cause inconvenience and loss to defendant, and, in consequence, defendant, on October 10, 1889, ordered plaintiff to cease work on the building. A counterclaim was also filed by defendant, consisting of numerous items, and amounting in the aggregate, to over thirty-one thousand dollars. To this, plaintiff filed a reply, which denies most of the claims made in the counterclaim, charges that the work was done in accordance with defendant's consent and approval, and avers that the work would have been fully completed had not defendant prevented. The cause was tried as an equity case to the court, and a judgment rendered for plaintiff for six thousand, seven hundred and twenty-seven dollars and ninety-eight cents, and a decree entered foreclosing the lien.

II. Many questions are raised and discussed by counsel. It is impossible for us to treat of all of them in detail. We shall only refer to those matters which appear to be of controlling importance in determining the rights of the parties. It is said that defendant has pleaded and proven that another action was pending in Chicago, Illinois, at the time of the trial of this cause below, between the same parties and in relation to the same subject-matter. While counsel for defendant argue that this action should be abated because of the pendency of the other action, we do not understand that, in its answer, the facts touching said action are pleaded or relied upon as an abatement at all. The division of the answer in which the facts now relied upon are pleaded is devoted entirely to setting forth the payments which have been made by defend-

ant company; and, to show these, certain facts are set out touching the pendency of an action in Chicago, wherein it is alleged that there was a controversy, among other things, as to whether a certain two thousand dollars had been applied by the parties as a payment upon the contract sued upon herein; and it is further averred "that, should the court in said cause determine that the two thousand dollars has been applied in payment, then the whole amount so paid would be the sum of seven thousand, five hundred dollars." As we have said, the thought of the pleader seems to have been, not to plead facts showing another action pending as a ground for abating this action, but rather facts which should be taken into consideration in determining how much has been paid upon the contract sued upon. We do not think the pending of that suit is a bar to the prosecution of this one.

III. Counsel for appellant claims that inasmuch as plaintiff sued upon a contract, alleging its performance, and as it appears that the contract was not fully performed, and there is no *quantum meruit* count, plaintiff can not recover. The trial was had in the district court upon the petition, answer, and counterclaim and reply, and upon the theory that defendant had prevented plaintiff from completing its contract; that plaintiff was entitled to recover the contract price, less what it would have cost to have completed the contract after the work was stopped by the defendant, and less what defendant was entitled to under its counterclaim. Now, the evidence below was introduced, without objection, to sustain these several claims of the parties, and largely touching the question as to the cost of completing the repairs according to the contract after defendant stopped the work, and as to the amount of defendant's damages. As we have said, no objection was made below to the introduction of evidence to establish plaintiff's claim under the

issues as they stood. It is now too late to claim that there is a variance between plaintiff's pleadings and the proofs. *Singer v. Given*, 61 Iowa, 95, 15 N. W. Rep. 858; *Ressler v. Baxley*, 81 Iowa, 751, 47 N. W. Rep. 57; *Lines v. Lines*, 54 Iowa, 602, 7 N. W. Rep. 87; *Iselin v. Griffith*, 62 Iowa, 668, 18 N. W. 302. Having tried the case below on the theory above stated without objection, it would be manifestly unfair to permit appellant's objection to prevail in this court, when, if made in the court below, appellee might have cured the defect in its pleadings, if any, by amendment.

IV. The testimony in this case is, as to many matters, conflicting, and it is difficult, as to some points of difference between the parties, to reach a conclusion which is entirely satisfactory. There are, however, certain important facts which, after a careful review of all the testimony, we find to be established by the evidence. They are as follows: *First*, That, aside from the exception hereafter stated, defendants knew of the modification and changes in the original contract, and, under all the circumstances, must be held to have authorized them, or to have assented thereto; *second*, that the defendants were, by reason of changes in the contract, made with their consent, and at their instance, chiefly responsible for the stoppage of the work; *third*, that much of the delay in the work was due to changes made by defendants in the work; *fourth*, that plaintiff was in no wise responsible for the fall of the tanks; *fifth*, that plaintiff did not furnish girders of the weight required by the contract; *sixth*, that defendant's foreman, Smith, acted for defendant in looking after the work and in making the changes; *seventh*, that, according to the contract, defendant was to furnish only common labor to assist in the work, and that it did furnish some labor in addition thereto; *eighth*, that plaintiff is entitled to a portion of its claim

for articles furnished outside of the contract. As to many items of damage claimed by defendant it may be said that, even if articles in fact furnished were not such as the contract required, it is reasonably clear that defendant accepted them, and found no fault with them until about the time the plaintiff began this suit; that in some cases it paid the contract price with full knowledge of defects not complained of, and without suggesting that the material furnished, and work done, were not in accordance with the contract. The failure to complete other work was due to defendant's act in stopping the work. Some seventeen hundred dollars is claimed by reason of damages caused by the falling of the tanks. As we have said, we think this was no fault of plaintiff. Defendant had stopped the work some days before this, and we do not think the fall was caused by the failure of plaintiff to do the work properly. Some eighteen hundred dollars is charged by defendant to plaintiff for men furnished at one dollar and twenty-five cents per day. We think this was the kind of labor which defendant was to furnish under the contract, and it appears from the evidence that defendant so treated it until long after the labor was so furnished. There is also an item of ten thousand dollars charged to plaintiff for loss of time and expenses, and damage by stopping factory, loss of goods, etc. Most of this damage is claimed for the month of September, during which time the factory did not run. Under the evidence it is a disputed question as to whether the factory was not shut down during the month of September by agreement. We incline to think such was the case. We can not consider in detail all the items of damages claimed. We have made an accounting between the parties, having in mind the conclusion reached, heretofore stated, and, in our judgment, the amount found due the plaintiff by the district court was substantially correct. We have given the somewhat voluminous

record and the arguments a careful examination, but the reasonable limits of this opinion preclude us from entering more into detail in discussing the matters in controversy between the parties. As the questions presented relate mostly to facts, and not to the law, it would serve no useful purpose to more fully treat of them. Our conclusion is that the judgment below should be **AFFIRMED**.

FRED MILLER BREWING COMPANY v. CHAS. DE FRANCE,
Appellant.

90	395
110	168
90	395
116	714
117	441
90	395
131	645

Intoxicating Liquors: Law of Sister State. Where the answer in an Iowa action admits that a recovery should be had for liquors sold and delivered in Wisconsin, were it not for the laws of Iowa, the presumption is that the law of Wisconsin permitted the sale. (3)

SAME. Under such answer, it was proper to charge that such sale and shipment of liquor into Iowa, to be sold in original packages, was lawful. (5)

SAME: CONTRACT WHERE MADE. An agreement made in Iowa that beer should be shipped from Wisconsin whenever ordered by defendant in Iowa, is but a conditional agreement for future sales and does not bind defendant to order, and sale and delivery of beer in Wisconsin on orders given there, are made in Wisconsin. (6)

Intent of Corporation: Testimony of Agent. An agent who makes a contract for a corporation is competent to testify that in making such contract the corporation did not intend to enable the other contracting party to violate law. (2)

Practice: Harmless Admission of Evidence. The statement of a conclusion is not prejudicial when immediately followed by the grounds of it. (1)

SAME: ESTOPPEL TO OBJECT. One whose objection excludes certain testimony as immaterial can not say that its absence is a failure to prove a material fact. (4)

SAME: ORDER OF ARGUMENT. Where defendant files a substituted answer which puts the burden of proof on him after plaintiff has made his opening argument, it is within the discretion of the court to allow the plaintiff to close the argument. (4)

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

TUESDAY, FEBRUARY 6, 1894.

THIS action is to recover the contract price of beer alleged to have been sold by the plaintiff, as a corporation, under the laws of Wisconsin, to the defendant, and delivered at Milwaukee, Wisconsin, for shipment to Des Moines, Iowa, for sale in original packages. There was a denial, and a counterclaim for money paid to plaintiff for beer sold to defendant in violation of the laws of Iowa. There was a verdict and judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

Cole, McVey & Cheshire for appellant.

Read & Read for appellee.

GRANGER, C. J.—I. E. G. Miller's testimony is by deposition, and to an interrogatory he answered as follows: "*There was no particular agreement, other than it was understood between Chas. De France and myself, acting for the company, that the beer was to be handled by him strictly in accordance with the laws of Iowa, under the so-called 'Original Package Decision,' and that he should handle it strictly in the packages in which it was delivered to him, and that he should in no manner violate any laws governing the sale of intoxicating liquors in his state.* I distinctly stated to him that our company did not want to have any trouble, and did not want to furnish beer to anybody who would be getting into trouble, and that we should deliver the beer to him on board the cars at Milwaukee. I stated to him that he must not sell by the bottle, but only by cases and kegs. He stated to me, at that time, that he had a good business, and that he would sell the beer in the packages in which he received it. This is the substance

of what was said by both of us, as near as I can now recall." There was an objection to the italicized portion of the answer, to the overruling of which the appellant complains. The complaint is that the answer states an "unwarranted conclusion," and not the facts within the knowledge of the witness. The statement as to the understanding is immediately followed by a statement of what was said by both parties, from which the understanding was deduced. The conversation admits of no other understanding than that expressed. Had the latter part of the answer alone been given, the effect, with the jury, must have been the same. Under such circumstances, there could have been no prejudice. It is a statement of a conclusion from facts that are in evidence. The question is somewhat like that in *Headley v. Hammond*, 62 Iowa, 599, 19 N. W. Rep. 794.

II. The following is "Exhibit D" to the deposition of E. G. Miller:

"MILWAUKEE, May 7, 1890.

"Agreement between Chas. De France and Fred Miller Brewing Company. We, the Fred Miller Brewing Company of Milwaukee, Wisconsin, do hereby appoint Mr. Chas. De France our sole agent for Des Moines, Iowa, to handle our goods in the original packages only.

"FRED MILLER BREWING COMPANY.

"By FRED A. MILLER, Secretary."

The following is part of an answer to an interrogatory by the witness: "Exhibit D" was given defendant by plaintiff, and has no relation to contract dated May 10, other than to secure to defendant the exclusive right to handle our beer at Des Moines. It was simply an undertaking on the part of plaintiff not to sell beer to any other person at Des Moines who would sell in competition to defendant." The court overruled an objection to the answer as stating a conclusion as to the intentions of the persons. The offer of the testi-

mony by the plaintiff was on rebuttal. The defendant had before put the same in evidence, and the mere fact that it was placed there a second time would not constitute error.

III. The same witness testified that the plaintiff, in selling the beer, did not intend to furnish it to be sold in violation of the laws of Iowa. He said: "I instructed defendant to sell all liquors in accordance with the laws of Iowa. I know that no other officers of plaintiff, nor any of its authorized agents, instructed him otherwise. * * * I deny that the contract dated May 10, 1890, was made by plaintiff with the intent to enable the defendant to violate the laws or statutes of Iowa for the suppression of intemperance." The court refused to exclude this evidence, with other of like import, indicating the intent of the officers of the corporation, of which action complaint is made. It is conceded that the agents who acted in making the sales could testify as to their own intent, but the complaint is that they could not testify as to the intent of others. It is undoubtedly true that one person can not understand the mental process and conclusions of another, so as to know with what intent or purpose he acts, and likely, under many circumstances, as a witness, he would not be permitted to state as a fact, or as an opinion, such a conclusion. It is, however, true that persons who act for corporations may have such knowledge of its intentions and purposes as to be able to testify in regard to them in matters wherein such corporate intent becomes a subject of legal inquiry. Corporations can only act through agents, and it is not doubted but that intentions are as much an element in fixing their legal rights and liabilities as in cases of natural persons. If, then, in a matter wherein its intentions are important, it delegates to an agent power to act, defining to the agent its purpose, can it be said that such agent has not such knowledge of the

intent of the corporation as to be competent to give evidence of it? It is difficult to imagine a case in which the intent of the agent, if responsive to his instructions and authority, would not be that of the corporation. In a very significant sense it may be said, where the agent observes his authority, that he is the embodiment of the purposes and intentions of the corporation. When the witness stated positively that the plaintiff had no intent that, in the sale of beer, the laws of Iowa were to be violated, he could properly have been understood as stating no more than the intent of the corporation as expressed or manifested by the proper authority in the course of the transaction. Of course, such a statement by the witness is not conclusive. The further examination may develop his means of knowledge, and the ultimate fact become one for the jury. We think there was no error in the action of the court.

IV. In the deposition of Miller there was evidence to show that the sales of beer were legal in the state of Wisconsin. Defendant objected to this part of the deposition, and he says, in argument, that it "was excluded on the ground of immateriality." He now urges that there can be no recovery in this case by the plaintiff, because the laws of Wisconsin are presumed to be the same as those of Iowa, in the absence of proofs to the contrary, and hence that the sales in Wisconsin were in violation of its laws, and invalid. A conclusive answer to the appellant's petition is this: In a substituted answer he "admits that, but for the matters and things hereinafter pleaded, the plaintiff would be entitled to recover." Nothing thereafter pleaded in any way refers to, or brings in question the laws of Wisconsin. The defense is based entirely on a violation of the laws of Iowa, but for which, it is admitted, plaintiff should recover. It may be further said that the exclusion of the testimony as immaterial,

on motion of the defendant, would preclude him from afterward taking such an advantage because of its absence.

V. Appellant urges that the court erred in not permitting him to open and close the argument to the jury. The claim of such a right is based on the fact that he filed his substituted answer, "wherein he admitted that, except for matters therein stated, plaintiff would be entitled to the sum claimed by it." It is true that the filing of this pleading so changed the issues that the burden was on the defendant. It was not filed, however, till after the opening argument was made. It was then so late in the trial that the request to open and close the argument could not be granted as to both and it is easy to understand that to then grant the right to close might be prejudicial to the plaintiff. It was certainly a matter to be controlled by the discretion of the trial court. See *Woodward v. Lavery*, 14 Iowa, 381, and *White v. Adams*, 77 Iowa, 295, 42 N. W. Rep. 199.

VI. The court instructed the jury that the plaintiff might lawfully sell and deliver to the defendant the beer, and that the defendant might lawfully buy and ship the same to Des Moines, and sell the same in the original packages. It is urged that notwithstanding the holding in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, the instruction is erroneous, as contravening the rule of *Pearson v. Distillery*, 72 Iowa, 348, 34 N. W. Rep. 1, and *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6. The application of the rule of those cases is urged on the theory that the sales were presumptively in violation of the laws of Wisconsin. As we have said, the plaintiff's right to recover, under the admissions of the answer, is in no way affected by the laws of Wisconsin.

VII. The defendant, by way of counterclaim, seeks to recover from plaintiff one thousand, three hun-

dred and fifty dollars that had been paid to plaintiff for beer under their contracts. The district court said to the jury: "The evidence shows that the liquors sold, the price of which is sought to be recovered back, were not sold to defendant in Iowa, but were sold and delivered to defendant in Milwaukee, in the state of Wisconsin." Appellant complains of the instruction, and claims that the sale was by virtue of a written contract made at Des Moines, May 16, 1890, as follows:

"DES MOINES, IOWA, May 16, 1890.

The Fred Miller Brewing Company of Milwaukee, Wisconsin, agree to deliver f. o. b. cars Milwaukee, whenever ordered by Chas. De France, of Des Moines, Iowa, beer at the following prices: Keg beer at \$5.50 per bbl.; Export beer in bottles at \$2.80 per case of two dry qts. each; Budweiser in bottles at \$3.20 per case of two dry qts. each. Said brewing company agrees to refund \$1.20 for each case and two dozen bottles, when returned. Said Chas. De France in turn agrees to pay for such ordered goods on demand of said brewing company, and also binds himself and agrees to pay, for all empty keg packages not returned, at final settlement, at the rate of \$1.00 for each 1-8 keg, and \$1.50 for each 1-4 keg. Said brewing company agrees to furnish said Chas. De France one light delivery wagon, which is to be returned to said brewing company when said De France ceases to handle their beer. This contract to be in force for one year from date.

"FRED MILLER BREWING COMPANY.

"By E. G. MILLER, President."

It will be seen that this agreement is not one of sale. It is but a conditional agreement as to sales in contemplation. The terms of the agreement were to become operative only if defendant ordered beer, which he was under no obligations to do. His order at Milwaukee, and the delivery of the beer there, gave rise to

the plaintiff's claim. Without the order, plaintiff would have no right of action whatever. The Iowa agreement was only as to contracts to be made and performed in Wisconsin. The evidence, in so far as it affects the question, and the contract, justify the instruction given by the court. A further criticism of the instruction is made because the jury was told that "to enable the defendant to recover back the money paid, the liquor must have been sold in violation of section 1550; and, to be sold in violation of this law, it must have been sold *within the jurisdiction of said law, for said law has no extra territorial jurisdiction.*" The italicized words are those complained of, because they speak of the law as having jurisdiction, and it is said to be misleading. If it should be conceded that the word "jurisdiction" was technically misapplied (for certainly nothing more would be true of its use), the intended meaning of the instruction is too manifest to be misleading to any person of ordinary intelligence.

VIII. There is a claim that the evidence shows that the beer was, in fact, sold in violation of the laws of this state. We think not to the extent that we should disturb the finding of the jury on that question. The question seems to have been fairly submitted, and a finding returned favorable to plaintiff. The judgment is **AFFIRMED**.

A. ADY, Appellant, v. J. P. FREEMAN.

Dissolving Injunction : ATTORNEY'S FEE. Where an action seeks relief besides injunction, and the writ is superseded, and so far as damages pending suit is concerned, practically, dissolved by bond, without a motion to dissolve and without the aid of an attorney, no attorney fee can be recovered for dissolving the writ. (1)

Nominal Damages: Reversal. A judgment will not be reversed in order that nominal damages may be recovered. (2)

Appeal from the Muscatine District Court.—HON. W. F. BRANNAN, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

THIS is an action to recover damages on an injunction bond. There was a trial by jury. At the close of the introduction of plaintiff's evidence, on motion of defendant's counsel, the court instructed the jury that the plaintiff had failed to introduce any evidence in support of the allegations of his petition, and there should be a verdict for the defendant. The plaintiff appeals from the judgment upon a verdict rendered in obedience to the said instruction of the court.—*Affirmed.*

N. Rosenberger and Detwiler & Doran for appellant.

Richman & Burk for appellee.

ROTHROCK, J.—I. It appears from the record that the defendant, Freeman, leased office rooms to the plaintiff, Ady, for a term of years. Plaintiff is a physician and surgeon, and occupied the office in the practice of his profession. The lease, by its terms, did not expire until August 1, 1888. While Ady was in possession of the office, Freeman enlarged a porch above the windows of one of the rooms. Ady claimed that the change made in the porch obstructed the light in his rooms. There was some controversy about the matter, and Ady leased other rooms, and, while preparing to move from the defendant's rooms, the defendant, on the twenty-seventh day of September, 1887, commenced a suit against Ady, claiming a landlord's lien on the personal property in the rooms, and that eight dollars was due on the rent, and that eighteen dollars and seventy-five cents would become due on the last day of each month during the term of the lease, and that his lien would be lost if Ady removed the personal property.

Judgment was demanded for such sums as might become due at the time of the final disposition of the cause. A writ of injunction was prayed for and issued, restraining Ady from removing the property upon which Freeman claimed his lien. Three days after the service of the writ of injunction, Ady gave a bond to pay any damages and costs that might be adjudged against him in the action, and the injunction was thus practically dissolved, or rather superceded, and Ady removed his property from Freeman's rooms. The said cause was afterward tried, and a decree was entered in favor of Ady. This action was brought to recover five hundred dollars damages on the injunction bond.

The principal question in the case is whether the plaintiff is entitled to be reimbursed for attorney's fees in procuring a dissolution of the injunction. The amount demanded for that service is one hundred dollars. The district court was of opinion that plaintiff was not entitled to recover attorney's fees. We concur in that opinion. We have set out the claims of the parties in the suit in which the injunction issued, for the purpose of showing that the plaintiff is not entitled to attorney's fees for procuring a dissolution of the injunction. The injunction was not the only relief demanded. Judgment was prayed for the rent due and to become due up to the time of the trial. No motion was made to dissolve the injunction. So far as any right to recover damages pending the suit was involved, the injunction was practically dissolved by giving the bond in three days after it was issued. It does not appear that counsel performed any services whatever in procuring a dissolution of the injunction. That no attorney's fees can be recovered in such cases, see *Langworthy v. McKelvey*, 25 Iowa, 49; *Carroll Co. v. Iowa R. L. Co.*, 53 Iowa, 685, 6 N. W. Rep. 69.

II. It is urged that the court erred in refusing to permit the plaintiff to prove damages which he claimed accrued to him by reason of being prevented from moving his property from the office for three days. It may be that, by applying technical rules, the plaintiff could have shown some damages; but our examination of the case leads us to the conclusion that the legitimate damages, aside from the claimed attorney's fees, were so inconsiderable as to come within the well known rule that a cause will not be reversed to enable a party to recover nominal damages. Other questions are made, which we think do not demand consideration. The judgment of the district court is **AFFIRMED**.

HANNAH R. HAGGERTY, Administratrix, v. THE CHICAGO,
ST. PAUL & KANSAS CITY RAILWAY COMPANY,
Appellant.

Contributory Negligence: Hanging on Car Ladder. One whose duty it was to take car numbers, came down the side ladder of a car, soon to stop, but in motion, to the bottom of the ladder, and while hanging there to alight when the car stopped, was killed by coming in contact with a switch which could not have struck him had he been higher up. *Held*, that there was contributory negligence. See *McKee v. Railway Co.*, 83 Iowa, 616.

Appeal from Dubuque District Court.—HON. JOHN J. NEX, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

THIS is an action to recover damages for a personal injury resulting in the death of Hugh C. Haggerty. From a judgment on a verdict for the plaintiff, the defendant appeals.—*Reversed*.

D. E. Lyon for appellant.

J. H. Shields for appellee.

ROTHROCK, J.—Hugh C. Haggerty was in the employ of the defendant as car accountant at Dubuque on the thirtieth day of September, 1887. On the evening of that day he was killed while riding on the ladder on the side of a box freight car. The evidence tends to show that he came to his death by contact with a switch stand at the side of and near the railroad track. There is some evidence tending to show that the deceased jumped from the ladder, but the jury were fairly warranted from all the evidence in finding that he came to his death by hanging on the ladder, and that he was knocked off the ladder by striking against the switch stand; and we think that the finding involved in the verdict, that the switch stand was too near the track, is justified by the evidence.

A number of questions were raised on the record which call in question the correctness of the court's rulings upon the admission and exclusion of evidence. But few of these questions were presented in the arguments made in this court, and, in the view we take of the case, it is unnecessary to consider any of them. The main question in the case is whether the jury were authorized in finding from the evidence that the deceased was free from negligence which contributed to the injury which caused his death. In other words, did the plaintiff show, by sufficient evidence to authorize a verdict, that the deceased was not negligent in riding on the car by holding to the ladder on the side thereof? It would be impossible, by any statement of facts which we can make from the record, to reproduce the exact situation surrounding the deceased when he came in contact with the switch. It was his duty in the prosecution of his work, to take the numbers of the cars of incoming trains, and to take the seals, as some of the witnesses expressed it. The seal is a strip of tin fastened or wrapped around the fastening on one of the side doors of the car. We do not understand that it is

the duty of the car accountant to remove the seal. As we understand it the seal is stamped with the number of the station from which the car is sent, and it is the duty of the car accountant to take this number. The numbers of the cars are in large figures on the side of the car and also on the end. It is impossible from the record before us to describe the exact situation surrounding the deceased when he came in contact with the switch stand. It appears that the train was in the yards, switching, and moving back and forth. The deceased was for some reason on top of one of the box cars. It is claimed by counsel for appellee that he was engaged in taking the numbers of the cars by looking down between them, and getting the numbers from the ends, and there is evidence showing that the numbers could be taken in that way; but there is no evidence that he was thus engaged, and this was no reason or excuse for hanging at the foot of the ladder at the side. It is claimed by counsel for appellee that he was in his proper place, swinging on the ladder, to take the numbers from the side of the cars in the train, and to take the seals or numbers of the seals, and there were witnesses who had the hardihood to make that claim under oath. It does not appear that there was any rule of the company upon the subject, and no such claim is made in the petition. The right of recovery is based upon averments that deceased was rightfully on top of the train, "so as to perform his duty in connection therewith when the same should stop, and when said cars were detached from the engine, were running to a point where the same were to stop, said decedent, while in the discharge of his duty as such employee and car accountant, and in the exercise of all due care, and without any negligence on his part, as said cars were soon about to stop, went from the top of the car, where he was standing, down the ladder on the side thereof—the same being the means provided to reach the ground

from the cars aforesaid—to the lower end of the ladder aforesaid, and while there standing and waiting for said car and train to stop, so that he could safely reach the ground, where his duty and business at that time called him, and while in the performance of his duty, and in the exercise of all due care while so standing on the ladder aforesaid,” he was struck by the switch. The evidence shows beyond all question that the averment of the petition that “said cars were soon about to stop” is true. It further appears that if the deceased had not gone down to the very bottom of the ladder he would not have been injured. Indeed, the evidence tends strongly to show that he must have had his foot on the oil box under the car in order to be low enough down to come in contact with the switch.

At the close of the introduction of the evidence, the defendant made a motion to direct a verdict for the defendant. We think the motion should have been sustained, on the ground that there was not only no showing on the part of the plaintiff that the deceased exercised the care and caution required by law, but that the evidence plainly and without conflict showed that he was riding on the ladder without any reason for so doing, and in reckless disregard of his safety. It is unnecessary to cite the long line of cases in this court sustaining these views. For a full discussion and reference to authorities upon the question, see the late case of *McKee v. Railway Co.*, 83 Iowa, 616, 50 N. W. Rep. 209. The judgment of the district court is REVERSED.

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FRANKLIN BRADSHAW AND WIFE, Appellants, v. LEANDER B. REMICK.

LEANDER B. REMICK v. FRANKLIN BRADSHAW AND WIFE, Appellants.

Abandonment of Homestead: Waiver of Platting on Sale.

Where a homestead is sold under foreclosure without platting as the statute provides, and after deed, the husband, for years, occupies the land under lease from the grantees in the deed, with the knowledge of and without objection from the wife, there is an abandonment of the homestead right, and the failure to plat can not be taken advantage of. *Morris v. Sargent*, 18 Iowa, 90, distinguished.

Trust to Reconvey. Loose declarations by grantee that the execution defendant might have the land back for what he "had in it," not assented to, and abandoned by declarant, the other subsequently occupying the land under lease, will not set aside the sheriff's deed and create a trust to reconvey.

Appeal from Greene District Court.—HON. CHARLES D. GOLDSMITH, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

Franklin and Aner E. Bradshaw are husband and wife, and plaintiffs in the first above entitled action. On the first day of July, 1881, Franklin Bradshaw being the owner of the southeast quarter of section 21, township 85 north, of range 29, in Greene county, the plaintiffs joined in a mortgage thereon to Edward Heliker, trustee for Thomas W. Marshall, to secure the sum of seven hundred and fifty dollars. The mortgage was, in 1884, foreclosed in a suit, with these plaintiffs as defendants, and at a foreclosure sale on execution the land was bid in by the defendant, Leander B. Remick, for the amount of the judgments and costs; he at the time holding a junior mortgage lien on the land to secure two notes aggregating seven hundred

dollars. From the spring of 1881 up to the sale on execution the plaintiffs had resided on the land sold, and during that period had a homestead right therein. The sale under the foreclosure judgment was in January, 1885, and in February, 1886, Remick received a sheriff's deed for the entire quarter section. The plaintiffs continued to occupy the premises from the execution of the deed to Remick to the commencement of this suit under circumstances substantially as follows: In February, 1886, the husband, Franklin Bradshaw, leased the premises from Remick for one year at a cash rental of three hundred dollars. This lease was in effect renewed each year to and including 1890, with the following exceptions: Frank W. Bradshaw, one of the defendants in the second entitled action, is a son of the plaintiffs in this action, and for the year 1888 the lease was made to him; and for the year 1890 it was made to Franklin Bradshaw and Frank W. Bradshaw, being father and son. It is averred in the petition, in substance, that when Remick bought the land at the foreclosure sale it was under an agreement between Remick and Bradshaw that Remick should take the title in trust until such time as Bradshaw should repay him for expenditures and his liens thereon, when the title should again vest in Bradshaw. This action is brought to set aside the deed and sale of the land, and permit an accounting and redemption, under the claim, *first*, that plaintiffs had a homestead right therein, and that the sheriff, in making the sale, did not observe the statutory requirements as to the platting and sale thereof, and, *second*, because of the trust relationship between the parties. The answer puts in issue the facts pleaded in the petition, avers abandonment on the part of the plaintiffs of their homestead rights by their acts in becoming lessees of the premises and occupying the same as such, and asks by way of affirmative relief that the title to the land be quieted in him. The district

court found the issues with the defendant and granted him the relief prayed.

The foregoing statement has reference only to the first entitled cause. In the second cause there was a judgment below for plaintiff, it being a suit to enforce a landlord's lien for the rents of the land, and it is to abide the result of the first case, in which the plaintiffs appealed.—*Affirmed*.

H. E. Long for appellants.

A. M. Head for appellee.

GRANGER, C. J.—We do not think that it is necessary to consider the claim of appellants as to the platting and sale of the land, for we are agreed that there was, after the sale, an abandonment of the homestead right, without which there was no legal basis to set aside the sale and grant the relief prayed. There is no room for serious contention but that, as to the husband, there was an abandonment, because of his leasing the premises for four years and occupying them under a lease to his son for another year after the deed to the defendant. The parties continued their occupancy of the premises for the full period of their statutory rights, and when the sheriff's deed was made, which gave to the purchaser the right of possession, Bradshaw acquired the right to further occupy them just as any stranger would naturally and legally have acquired such a right,—by contract with the owner. He gave unmistakable evidence of an intentional change in the character of his occupancy from that of owner to that of lessee. His occupancy as lessee was absolutely inconsistent with a claim of homestead right. The character of the leases he signed was, in every particular, in plain contradiction of a homestead claim or right. Aner Bradshaw, the wife, was not a party to the leases, but the situation is little less conclusive as to her. She

knew of the sheriff's deed to Remick; she knew that, in consequence of the sale, her husband intended to, and did afterward, lease the land, and of his continuous occupancy as a lessee. So far as a wife could, she acquiesced both as to his understanding of the situation and purposes of occupancy. There was not a word of protest, dissent, or disapproval. We may say that it was then manifest to both of them that the title had passed by the foreclosure sale, and they were occupying the land by contract with the owner. She nowhere says that she then thought she was occupying it as a homestead. Some "straws" are afloat at which appellants are now grasping, but the facts are no less conclusive on this point than they would be if, after the sheriff's deed was made, they had moved from the premises without an intention to return, and then, after nearly five years, had set up a homestead right. The legal conclusion is that they concurred in the sale as made, and it is now too late to retrace their steps.

Considerable stress is placed on the fact that Mrs. Bradshaw did not sign the leases, or any of them, by applying that fact to the law requiring the husband and wife to concur in and sign the same joint instrument in order to pass the homestead right or the title on which it rests. The statute has no application. The conveyance of the homestead was when she joined with her husband in the execution of the mortgage under which the sale took place. The leases but indicate the purposes or character of the occupancy after the deed was made. The leases, of themselves, took from her no right. It was the relation she voluntarily assumed under the leases, showing a voluntary surrender of the homestead claim. Numerous authorities are cited wherein are announced rules favoring homestead protection, as that the homestead is for the benefit of the family, and an abandonment by the husband will not

affect the right of the wife so long as she remains in possession; that in such a case a purchaser from the husband will be required to account to the wife for the rents, etc. Particular stress is placed on the case of *Morris v. Sargent*, 18 Iowa, 90, wherein it is held that the mere fact of a husband's becoming a lessee of property claimed as a homestead, although it may recognize the title in another, will not affect the rights of the wife in the homestead. Our holding in this case is no infringement on the rule there stated. We do not in any way bind the wife because of the acts of the husband, but because of her own acts after the leases were made and her long course of acquiescence in a situation known to her, indicating her intention during that period. The cases are in no important sense alike. No case cited is against our conclusion.

Appellants' claim that defendant took the title under an agreement to reconvey, upon payment to him of purchase price and other liens, is not supported by the evidence. There was, before the land was purchased by defendant, some talk that Bradshaw might have the land back for what defendant "had in it." That it amounted to a valid agreement, at the time, is, because of the meagerness of its details, quite doubtful. It is certain that Bradshaw did not assume any obligation in the matter whatever. There was merely a talk that if he paid what defendant "had in it" he could have the land back, and it appears that defendant regarded that as his agreement. But, in a later conversation, he says that Bradshaw "acknowledged that he could not get the money at that time, and that settled it." The entire course of business between the parties for five years, nearly, in regard to the land is against an understanding that the title was in defendant only in trust, but it is in harmony with the fact of absolute ownership by defendant. Their contracts from time to time fully recognized such ownership, and

far outweigh the effect to be given to loose and random talks in regard to so important a matter, wherein no time for performance was fixed, nor any other detail, not even making the obligation mutual. Such evidence is too weak to set aside a conveyance of land. These considerations dispose of the case. The judgment in each case will stand **AFFIRMED**.

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MARIETTA HURTO, Appellant, v. NETTIE E. GRANT AND EMILY DANIELS.

Reformation of Deed: Laches. Where a mother wrongfully takes title to land belonging to a daughter and subsequently executes a deed to her reserving a life estate, which deed is received and kept by the daughter for ten years, the right to possession remaining undisturbed during that period, there is such *laches* that the deed will not be reformed by striking out the reservation of the life estate. (2)

Conditional Life Estate: Forfeiture. Said reservation was on condition that the mother keep the insurable interest of the daughter in the premises insured. The mother, in good faith, obtained a policy which insured to the mother's benefit, only. Her attention was not called to this nor demand for a proper policy made for ten years. *Held*, that the life estate was not forfeited. (3)

Appeal from Scott District Court.—HON. C. M. WATERMAN, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

ACTION in equity for the partition of certain real estate, and for other equitable relief. From a judgment and decree in part denying plaintiff the relief prayed she appeals.—*Affirmed*.

D. B. Nash for appellant.

Davison & Lane for appellees.

KINNE, J.—I. The petition charges, in substance, that plaintiff is the owner of an undivided one half of certain real estate in Scott county, Iowa. That Nettie

E. Grant, defendant, owns the other undivided half of said real estate. That prior to April 20, 1869, plaintiff (then Marietta Wright) and her sister, Medora Wright, owned certain land in fee, and inherited same from their father's estate. That defendant Daniels (then Wright) was the mother of plaintiff and Medora Wright. That at said date, and acting for plaintiff and said Medora, said defendant Daniels sold said land for eleven thousand dollars, receiving the sum of six thousand dollars in money, and a deed of conveyance absolute in form to herself as grantee of a certain lot in the city of Davenport for the balance of said purchase price. That the deed was taken in defendant Daniels' name without plaintiff's knowledge or consent. That up to about 1880 she supposed the deed was in the name of herself and her sister. That defendant Daniels at all times represented that the deed had been so executed as to protect her rights as an owner of the premises, and plaintiff relied upon the truth of these representations. That in 1880, after discovering that the deed had been taken in the name of defendant Daniels, her sister's husband, employed one W. K. White, an attorney, to procure deeds from said Daniels to the sisters for said lot, and on October 15, 1880, said White procured said deeds. That said deeds contained the following provision: "The above and foregoing conveyance, however, is made expressly upon the understanding and agreement that during my natural life, while I remain unmarried, I shall be entitled to the possession of said premises and enjoyment of the rents and profits arising therefrom; provided, I shall at all times keep the insurable part of said premises insured in a reasonable amount for the benefit of those owning such insurable interest; and also that I shall at all times keep said premises in good reasonable repair; and also that I shall at all times pay and discharge all taxes and assessments against said premises, or any part thereof,

when due, all of which I do hereby covenant and agree to perform and do." That plaintiff was not present when said deed to her was executed by said Daniels. That she supposed such a deed would be executed as would vest in her title to the undivided half of said premises, and that she never agreed to take any other. She also claims that said condition in said deed "frustrates" the precedent estate, is inconsistent with it, and therefore void. She also charges that said Daniels has failed to comply with the conditions above set forth as to keeping the premises in repair, the property insured, and the payment of taxes; and avers that she has declared a forfeiture. She prays for a partition of the premises; that all claims of Daniels under said condition be adjudged void; that said deed be reformed, and plaintiff decreed to be the absolute owner in fee simple of an undivided one half of the lot. The answer of defendant Daniels admits that plaintiff and defendant Nettie E. Grant each own an undivided one half of the lot, subject to the right in her to use and occupy the same during her natural life; admits that prior to April 20, 1869, plaintiff and her sister, Medora, owned the farm, and that she is their mother; that she, acting for them, sold the farm, and in part payment received a deed to herself for the lot in controversy; admits that White procured deed as averred, and denies all other allegations in the petition. She avers she has been in possession of the premises since October 15, 1880, and is entitled to the rents and profits arising therefrom during her natural life; that she is and has been unmarried since October 15, 1880; pleads the conveyance to plaintiff, and her acceptance of the same, and that ever since October 15, 1880, she has received the rents and profits of the lot to her own use, with plaintiff's knowledge and consent; that ever since said time she has paid all taxes, kept the premises insured and in reasonable repair; and claims plaintiff is estopped from

claiming any interest in the premises in conflict with defendant's right of possession. Nettie E. Grant also filed an answer, in which she ratifies and confirms the defendant Daniels' acts, and the provisions of the deed from Daniels to herself. It is not material to more fully refer to it. The court found plaintiff to be the owner of an undivided one half of the lot, subject to Daniels' life estate, and ordered partition accordingly. To this plaintiff excepted, and appeals.

II. Doubtless the defendant Daniels did wrong in selling the farm and taking the title to the city lot in her own name. She had no right so to do, but, in view of the subsequent acts of plaintiff in accepting the deed obtained by White from her mother, she ought not now to be permitted to repudiate its conditions. True, plaintiff claims she never accepted this deed. She knew that White was acting for her as well as for her sister. She had been told that if she did not obtain a deed for her interest, and her mother died, the daughter by a subsequent husband would also come in for a share in the lot. Her own testimony shows that she was willing for her mother to take all the rents and profits of the place which she might need for her support. From the whole record it is apparent that the real object of plaintiff was to get a deed to her undivided one half, so that her mother could not sell or incumber it, and so that, in the event of her death, no interest in this lot would pass to her mother's daughter by the second husband. Now, while the plaintiff says she never accepted this deed, her statement amounts to nothing, as she admits she received it, and kept it, and from October 15, 1880, to October 13, 1890, she did nothing to dispute the right of her mother's possession to the property under the terms of the deed until the latter date, when this action was commenced. When she did talk to her mother about the matter, she did not claim that the provision in the

deed giving her mother possession during her lifetime was wrong or unsatisfactory. What she complained of was that she should have so much of the rent as her mother did not need. We think plaintiff's own testimony tends strongly to show that after receiving this deed she ratified and confirmed it. Plaintiff was of age even before her mother sold the farm, and there is no sufficient excuse offered for her failing for almost ten years after this deed was executed to her to insist upon her rights. We think, under all the circumstances, that by not exercising her right, if she had any, for that length of time, and by virtually acquiescing in the correctness of the deed as made, she has been guilty of such laches as should preclude her from now having the deed reformed. There is no occasion for treating of the many cases cited by appellant relating to trusts.

III. One ground of plaintiff's claim is that even if the deed from defendant Daniels to her is not reformed by eliminating the provision therein relating to Daniels' life estate, then her life estate should be decreed to be forfeited because of failure to perform the conditions in relation to payment of taxes, repairs, and insurance. The main ground on which a forfeiture is claimed is touching the insurance. In that respect the deed provided that defendant Daniels "shall at all times keep the insurable part of said premises insured in a reasonable amount, for the benefit of those owning such insurable interest." Now, defendant Daniels has kept the property insured in the sum of one thousand, two hundred dollars. No fault is found that the amount of the insurance is not as great as it should be, but it is said that by virtue of the wording of the policy defendant Daniels' interest is insured, whereas the intent of the provision was to protect only the insurable interest of plaintiff and the defendant Grant, for their exclusive benefit. The policy insures "Marietta W. Hurto and

Nettie Grant," and, after the usual provisions, contains this condition: "Loss, if any, payable to Emily Daniels as her interest may appear." An elaborate argument is made to show that such a policy is not in accord with the provisions of the deed, and that the policy as written affords no protection to plaintiff for various reasons. There is no necessity for our entering into a discussion of all these questions. If the claim is well founded, it would not be a ground for declaring a forfeiture, in the absence of any showing that the plaintiff had called the attention of defendant Daniels to the form of the policy, and asked that a policy proper in form be taken out; and especially when, as in this case, it appears that Daniels has in good faith attempted to comply with the conditions of the deed relating to insurance. See *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. Rep. 641; *Mills v. Seminary*, 15 N. W. Rep. (Wis.) 133. It would hardly comport with our idea of the duty of a court of equity to declare a forfeiture of Daniels' estate in the lots for a technical failure, if such it may be said to be, to comply with the provision touching insurance, when for nearly ten years plaintiff has made no objection to the form of the policies taken out by Daniels, and has never even suggested to the latter that the policies issued did not in all respects fully comply with her agreement. As to the conditions of the deed relating to the payment of taxes and to repairs, they seem to have been substantially complied with. In our view, no case has been made justifying a reformation of the deed, or warranting us in decreeing a forfeiture of the life estate of defendant Daniels. The judgment and decree below will be **AFFIRMED**.

JOHN F. WILLIAMS, JR., Appellant, v. HENRY
EVERHAM, JR.

Reforming Words, "Subject to Mortgage:" Evidence. The seller of a livery barn and contents dictated an offer that a mortgage of one thousand, seven hundred and eighty dollars on the barn was to be assumed, and that a conveyance subject thereto should be made, which offer was communicated to the buyer, and thereupon the buyer paid eight hundred dollars, received a conveyance of property worth at least two thousand dollars "subject" to the mortgage. Plaintiff testified that the true agreement was that the mortgage should be "assumed." *Held*, that the parties were mutually mistaken in using the word "subject," and that a reformation should be ordered substituting "assumed" therefor.

Appeal from Mills District Court.—HON. WALTER I. SMITH, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

ACTION in equity to reform certain written instruments, and for judgment thereon. Decree was entered dismissing plaintiff's petition, and for costs, from which he appeals.—*Reversed*.

Smith McPherson, L. T. Genung and Scott Lewis for appellant.

John Y. Stone and Shirley Gilliland for appellee.

GIVEN, J.—I. Plaintiff was the owner of certain lots, upon which is situated a livery barn. He also owned a lot of horses, harness, carriages, etc., kept in said barn and used in the livery business. There was a mortgage on the real estate securing two promissory notes of the plaintiff to C. S. Osborn, upon which there was due, and to become due, one thousand, seven hundred and eighty dollars. Plaintiff and defendant executed a writing as follows:

“MEMORANDA.

“GLENWOOD, Iowa, Oct. 19, 1889.

“Received of Henry Everham, Jr., twenty dollars on the sale of my barn complete, including eight horses, two double carriages, one buckboard, one spring wagon, four sets double harness, and all complete, and two of single harness—price, eight hundred dollars; and I will deed lots and barn to purchaser, or any person he suggests, subject to one thousand, seven hundred and eighty dollars incumbrance, and give bill of sale for all property sold clear of liens; possession to be given October 21, 1889.

“JOHN F. WILLIAMS, JR.”

“HENRY EVERHAM, JR.”

In pursuance of this agreement defendant paid plaintiff eight hundred dollars, and plaintiff delivered to him possession of the property, and, at the request of defendant, executed and delivered to I. M. Taylor a deed for the real estate. Mr. Osborn brought an action, aided by an attachment, against the plaintiff on one of his notes, and caused the attachment to be levied on the plaintiff's property. Plaintiff, to secure a release of his property, paid Mr. Osborn seven hundred dollars. Plaintiff alleges that it was the agreement that the defendant should assume said mortgage indebtedness to the amount of one thousand, seven hundred and eighty dollars; that the word “assumed” was intended where the word “subject” occurs, and “that, by mistake or oversight, the word ‘assumed’ was omitted and left out of said memoranda, and the conveyances and transfers afterward made on the part of plaintiff in carrying out the terms of said sale.” Plaintiff asks that said memoranda and deed be reformed, and made to express the true agreement as made, and for judgment

against the defendant for seven hundred dollars, with interest.

The burden is on the plaintiff to show, by clear and satisfactory proof, that the alleged mistake was made. *Tufts v. Larned*, 27 Iowa, 330; *Jack v. Naber*, 15 Iowa, 450. Plaintiff testifies that the agreement was that defendant assumed the mortgage debt, [and that he understood the words "subject to" to mean the same as "assume." In corroboration he relies upon the following facts: Previous to the sale, plaintiff put the property into the hands of J. E. Wickham to sell. Mr. Wickham made a memorandum of the prices and terms at which he was to sell, as given to him by the plaintiff, as follows:

"Mortgaged, \$1,780; due, \$1,000, October 19, 1890; balance due November. (Interest 8 per cent.)

\$1,780

1,500

\$3,280

"Will sell barn and black team, \$200; dun team, \$200; gray team, \$150; bay mare and sorrel mare, \$150; spring wagon, two carriages, \$250; three buggies, \$150; two sleighs, four sets double harness, \$100; two sets single harness, \$20; one buckboard, \$25; robes, whips, and saddles, and blankets, stove, bed and bedding—\$1,530, including everything belonging to the barn." Afterward, the plaintiff gave to Mr. Wickham a second memorandum, as follows: "1,780 assumed; Williams give deed subject to above mortgage, \$1,030; \$330 cash; balance due one year, with approved security, 8 per cent.; discount of 5 per cent. cash."

Mr. Wickham communicated the offer of plaintiff to the defendant, and brought the parties together, whereupon they dictated and executed the memorandum set out above; and in pursuance thereof the

defendant paid to the plaintiff the eight hundred dollars, and the plaintiff executed and delivered his deed for the real estate, "subject" to the mortgage, and delivered possession of the personal property. The evidence shows quite satisfactorily that the personal property alone was worth the amount paid, and that the real estate conveyed was worth from one thousand, two hundred to one thousand, five hundred dollars. To give effect to the writing as it is would be to give to the defendant at least two thousand dollars worth of property for eight hundred dollars. Surely, the plaintiff did not so intend, nor can we think that the defendant expected to receive all this property for the eight hundred dollars. Because of plaintiff's last offer, made through Wickham to the defendant, and because of the gross inadequacy of the price, and other facts appearing in the evidence, we reach the conclusion that the parties were mutually mistaken in using the word "subject" in their agreement, and that the understanding and agreement of the parties was that the defendant was to assume the mortgage debt on the real estate. It follows from this conclusion that the decree of the district court must be reversed, and a decree entered, reforming said written agreement as prayed by plaintiff, and a judgment entered thereon in favor of the plaintiff for seven hundred dollars, with interest from November 30, 1889. The case is remanded for decree in conformity with this opinion. REVERSED.

JOHN L. NICODEMUS, Appellant, v. SAMUEL YOUNG *et al.*

Redemption from Tax Sale: Offer to Repay Taxes. A pleading offering to pay all taxes due which are not barred by the statute of limitations, is sufficient though it aver that all the taxes paid by plaintiff more than five years before suit was begun are barred. (2)

Same: Abatement by Transfer. The fact that pending decree to repay taxes into court there is a transfer of the land by defendant, and that the grantee pays in the money, will not necessarily entitle plaintiff to relief in this court. Code, section 2561. (5)

90	423
110	525
90	423
112	331
90	423
119	287
90	423
142	167

Same: Variance in Initials. A variance in the middle initial of the grantee does not render the deed incompetent where his identity is established. (1)

SAME: BURDEN OF PROOF. One who produces a deed need not show that grantee was single and that the land was not a homestead. (1)

Failure to Pay Taxes on Wild Land. Failure to pay taxes on unimproved and uninclosed land does not necessarily defeat the right to redeem from the holder of an invalid tax title. *Mathews v. Culbertson*, 83 Iowa, 440, *distinguished*. (3)

Deed: Subsequently Acquired Title. Where grantor, by warranty deed, subsequently acquires title, it inures to his grantee. (1)

Statute of Limitations must be Plead. A denial that a tax sale was irregular does not authorize proof of the existence of possession for five years which bars the action under Code, section 902. (3)

Entering Delinquent Tax on List. Where there is a sale had for the tax of 1877 and the delinquent taxes for prior years are not entered on the tax list for 1877, the sale is invalid. (3)

Appeal from Clay District Court.—HON. LOT THOMAS,
Judge.

WEDNESDAY, FEBRUARY 7, 1894.

ACTION in equity to quiet the title to certain real estate. There was a hearing on the merits, and a decree in favor of the defendant, Samuel Young. The plaintiff appeals.—*Affirmed*.

Cory & Bemis for appellant.

Parker & Richardson for appellee.

ROBINSON, J.—This action was commenced in December, 1889, to quiet, in plaintiff, the title to the east half of the northeast quarter of section 18, in township 97 north, of range 35 west, in Clay county, which he claims to own by virtue of a tax deed. The defendant, Young, claims to be the owner of the title through conveyances from the general government. The district court adjudged the tax deed to be void, and that, upon the payment into court by Young of

two hundred and eighty dollars and seventy cents within forty days from the filing of the decree, the title in fee simple should be quieted and established in him as against the plaintiff. The decree further provides that, if payment was not made by the defendant as required, then the title in fee simple should be quieted and established in the plaintiff as against the defendant. The amount required by the decree was paid into court within the time given for that purpose. The tax deed through which plaintiff claims was recorded in February, 1881, and was executed pursuant to a sale made on the fifth day of December, 1877, for delinquent taxes of the years 1873 to 1876, inclusive. The deed was given to A. W. Miller, who, in December, 1884, executed to the plaintiff a special warranty deed for the land. The answer of defendant alleges that the tax deed is void for the following reasons: *First.* That, when the sale was made, the law of the state then in force required that the tax list of the county for the year 1877 should be in the hands of the treasurer on the first day of December, and that the list for that year was in fact in the hands of the treasurer of Clay county on that date, but that, when the sale was made, the taxes of the year 1876 and prior years, for which the land was sold, had not been entered on the list of 1877. *Second.* That notice of the expiration of the right of redemption was not served upon the person who was in possession of the land at the end of two years and nine months from the date of the sale. The answer further avers that the defendant has paid all the taxes due upon the land, and that he is ready and willing to pay all taxes which may be found to be lawfully due the plaintiff, but avers that all the taxes paid by the latter more than five years before the commencement of this action are barred by the statute of limitations.

I. The appellant contends that the defendant has failed to show an interest in the land which entitles him to question the tax deed. Section 897 of the Code contains the following: “* * * No person shall be permitted to question the title acquired by a treasurer’s deed without first showing that he or the person under whom he claims title had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid.” The land in question was a part of the swamp land grant acquired by the state by virtue of the act of congress entitled “An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,” approved September 28, 1850. The act operated as a grant *in presenti*, and vested the title to the land, within its provisions, in the state where the land was situated. In like manner the act of the general assembly of this state entitled “An act to dispose of the swamp and overflowed lands within the state and to pay the expenses of selecting and surveying the same,” which took effect February 2, 1853, operated to vest in the respective counties where the land was located the title thereto acquired by the state. *Emigrant Co. v. Fuller*, 83 Iowa, 601, 50 N. W. Rep. 48; *Bailey v. Callanan*, 87 Iowa, 107, 53 N. W. Rep. 1074. In August, 1861, a deed for the land was executed in the name of Clay county to Charles C. Smeltzer. On the first day of January, 1864, Smeltzer executed a warranty deed for the land to E. J. Court-right. The patent was not issued by the state to the county until the twentieth day of April, 1863, and in September, 1865, a second conveyance was executed, in the name of the county, to Smeltzer. On the twenty-fifth day of August, 1866, Courtright executed a quit-claim deed for the land to the defendant, Young. The

plaintiff objected to the introduction in evidence of the first deed to Smeltzer, on the ground that it was not shown to have been executed by due authority, and that it was given before the title to the land was perfected in the state. It is not necessary to determine the sufficiency of these objections, for the reason that the second deed from the county to Smeltzer was given after the state and county had acquired title to the land, and it was introduced in evidence without objection. It was in the name of the county, and was executed by the president or chairman of the board of supervisors, and was attested by the clerk of the board by its order.

Under these circumstances the deed was properly received in evidence. 1 Devl. Deeds, section 348. See, also, *Jamison v. Fopiana*, 43 Mo. 566. As the deed from Smeltzer to Courtright purports to convey the title in fee simple with covenants of warranty, the title acquired by Smeltzer through the second deed to him inured to the benefit of Courtright. Revision, 1860, section 2210; Code, section 1931. The name of the grantor in the body of the deed of Courtright to Young is given as Erastus J. Courtright, but the signature appears to be that of Erastus I. Courtright. Much is said in argument in regard to the effect of this apparent variance, and it is insisted by appellant that there is no competent evidence that the grantee of Smeltzer is the grantor of Young. Both Erastus J. Courtright and Young testify in the case, and show that the former sold the land to the latter, and executed to him the deed in question. That testimony and the deed were competent as tending to prove the averment of the answer that Young was the owner in fee simple of the land, and it was not necessary to plead that E. J. Courtright is the same person as Erastus I. Courtright. 1 Devl. Deeds, section 188. An abstract of title which follows the petition, and which we assume was attached

to it, states that the deed to Young was made in August, 1861, and that Smeltzer executed to one Jacob Kirchner a warranty deed for the land in March, 1864. It is argued from that showing that the first deed from Smeltzer conveyed no title, for the reason that the title had not then been perfected in the state; that, as the conveyance to Young was by a quitclaim deed, he acquired nothing by it; and that the title is vested in Kirchner. That theory ignores the fact that the deed to Courtright was executed and recorded before the deed to Kirchner was given, and that any interest afterward acquired by Smeltzer would vest in Courtright. The date of the deed to Young, as given in the abstract of title, is evidently not correct, however, as the evidence shows that it was not given until the year 1866. The appellant urges, as a further objection to the title of Young, that the Smeltzer deed was not signed by his wife; that the land may have been Smeltzer's homestead, and, if it was, his deed was void. Counsel have not referred us to any authority which would cast upon the defendant the burden of showing that Smeltzer was not married, or, if he was, that the land was not his homestead when he executed the deed to Courtright, and we know of no rule of law which authorizes the presumption that Smeltzer had a wife and occupied the land as a homestead at that time. We conclude that the evidence shows that Young is the owner of the land, if his title has not been divested by the tax deed.

II. The appellant further insists that defendant can not question the tax deed, for the reason that he has not paid all taxes due upon the land. It is shown that all taxes levied on it for the years 1877 to 1890, inclusive, have been paid by A. W. Miller, and we must presume that all the taxes due prior to the tax sale have been paid; therefore, it appears that there were no taxes due when this cause was tried by the district court. *Adams v. Burdick*, 68 Iowa, 668, 27 N. W. Rep. 911; *Taylor*

v. Ormsby, 66 Iowa, 111, 23 N. W. Rep. 288. The defendant avers in his answer that he is ready and willing to pay all taxes that may be lawfully due upon the land, which are not barred by the statute of limitations. It is true, he also alleges, that all taxes paid by the plaintiff more than five years prior to the commencement of this action are barred by that statute; but we think a fair construction to be placed upon the pleading is that it tenders repayment of all taxes for which plaintiff is entitled to recover in case the defendant is allowed to redeem, and that is sufficient. *Taylor v. Ormsby, supra*.

III. It is agreed that the tax list for 1877 was placed in the hands of the treasurer on the twenty-second day of November of that year, but none of the delinquent taxes for the years 1874, 1875, and 1876 were ever entered in it. That omission rendered the sale invalid. Code, section 845; *Dows v. Dale*, 74 Iowa, 109, 37 N. W. Rep. 1; *Barke v. Early*, 72 Iowa, 274, 33 N. W. Rep. 677; *Gardner v. Early*, 69 Iowa, 43, 28 N. W. Rep. 427. But section 902 of the Code provides that "no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded." More than eight years intervened between the recording of the tax deed in controversy and the commencement of this action, and it is urged by the plaintiff that it is barred by the statute. In *Griffin v. Bruce*, 73 Iowa, 126, 34 N. W. Rep. 773, it was held that the omission of the treasurer to comply with the provisions of section 845 was a mere irregularity, of which advantage must be taken within five years after the recording of the tax deed, to avoid the bar of section 902. But it is contended by defendant that plaintiff is not entitled to rely upon the bar of the statute, because he did not plead it. It is the general rule that a party relying upon the statute of limitations must plead it in order

to secure its benefits. *Welch v. McGrath*, 59 Iowa, 527, 10 N. W. Rep. 810, and 13 N. W. Rep. 638; *Brush v. Peterson*, 54 Iowa, 245, 6 N. W. Rep. 287; *Robinson v. Allen*, 37 Iowa, 28; *Harlin v. Stevenson*, 30 Iowa, 375. It is said, however, that it was not necessary to plead the statute in the reply in order to make it available, for the reason that the petition alleges that the plaintiff is the absolute and unqualified owner of the land; that such a title may be based upon the statute of limitations; and that under the issues raised by the petition and answer, and the denial of the answer, which is made by implication of law, evidence to show title so based is competent. But the abstract of title attached to the petition shows that the title upon which the alleged ownership of plaintiff depends is grounded upon a tax deed. The answer pleads specifically that the deed is invalid because the delinquent taxes for which the land was sold had not been entered in the tax list of 1877, which was in the hands of the treasurer when the sale was made. The denial made by the law was of that averment. The statute of limitations was in the nature of an affirmative defense to the defects in the tax title alleged in the answer, and should have been pleaded in a reply to be effective. The claim made by appellant, that the action was tried as though a reply had been filed, is not, we think, sustained by the record. It is said that the negligence of defendant in failing to pay taxes has been so great that relief should be denied him; but the land is unimproved and unoccupied, and while the omission of defendant to discharge his duty by paying taxes when due should weigh against him, yet we do not think it should defeat his claim to relief. The case is in many respects unlike that of *Mathews v. Culbertson*, 83 Iowa, 440, 50 N. W. Rep. 201, and other cases relied upon by appellant. We conclude that the tax deed must be held to be invalid,

and that defendant is entitled to redeem from the sale on which it is based.

IV. The appellant filed in the district court a motion to retax the costs, based on the ground that defendant had not tendered the payment of taxes. The court sustained the motion to the extent of taxing thirty-seven dollars, thirty-two and one half cents of the costs to defendant. The remainder, amounting to forty-three dollars, eighty-seven and one half cents, were taxed to the plaintiff. We think that action is sustained by the record.

V. The appellant contends that the appellee has not paid into court the amount required by the decree, in order to have his title established as against the appellant. If that is true, we fail to discover any reason for the appeal of the latter. But the record shows that the required amount was received by the clerk—"of Samuel Young by Parker & Richardson"—within the time fixed by the decree. The claim of appellant in regard to this matter is based upon a statement in an amendment to his abstract, to the effect that defendant has sold the land in controversy to Parker & Richardson since the decree of the district court was rendered, and that the payment was really made by them for their own benefit. The statement is not sustained by the record, but, if true, would not necessarily entitle the plaintiff to relief in this court. Code, section 2561.

VI. Complaint is made of an additional abstract filed by appellee, on the ground that it was unnecessary, and it is asked that the cost thereof be taxed to him. We find that it contains portions of the record omitted from the abstract, or not fully abstracted, which were material to a determination of the action on its merits, and the application to tax its cost to appellee will be denied. The conclusions announced

dispose of all questions in the case which it is necessary to determine. The decree of the district court is sustained by the record, and is **AFFIRMED**.

L. H. BURNS AND C. F. WEBSTER, Executors, etc., v. M. L. McNALLY, Mayor, E. C. FARRINGTON et al., Appellants.

Taxation: Locus of Personalty. Where part of mortgages and moneys is in the possession of each of two executors residing in different townships of one county, the part held by each should be assessed where the executor having it lives, though the decedent lived in the township of the other executor. Code, 803, 805, 817 and 822, construed. But this is not necessarily so where personal property in the possession of an executor residing in a given township, has a fixed location in another; neither does it follow from the mere fact that personal property is in a given taxation district at the time when an assessment is required to be made that it must be assessed in that district. *Smith v. City*, 86 Iowa, 516; *Meyer v. The County*, 43 Iowa, 592; *Ament v. Humphrey*, 3 G. Gr. 225; *Lemp v. Hastings*, 4 G. Gr. 448, and *Hunter v. The Board*, 33 Iowa, 376, distinguished. *McGregor v. Vaupel*, 24 Iowa, 439, criticised. *Cameron v. The City*, 56 Iowa, 322, approved. (3)

Board of Equalization: Appeal. Appearance by one aggrieved and an informal statement that his property has been assessed in another township and that he does not want to pay taxes in both places, gives a right to appeal which the board can not defeat by inaction or failure to record. Code 829, 830 and 831. (2)

Appeal from Howard District Court.—HON. L. O. HATCH, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

APPEAL from the judgment of the district court reducing the amount of plaintiff's assessment on moneys and credits.—*Affirmed*.

H. T. Reed for appellants.

John McCook for appellees.

90 432
94 256
90 432
104 642
105 571

90 432
114 107
114 108

90 432
122 632
90 432
125 153
126 286

90 432
129 533

90 432
137 233

KINNE, J.—I. The material facts in this controversy are: That plaintiffs are the executors of the last will of one J. S. Hastings, deceased, who at the time of his death, and for many years prior thereto had been, a resident of the incorporated town of Lime Springs Station, in Howard county, Iowa. Defendants are the mayor, assessor and trustees of said town and the auditor of the county. In 1892 the assessor of said town assessed the estate of said Hastings with five thousand dollars, moneys and credits for that year. Plaintiffs claim said estate had no moneys and credits that year which were assessable in that town. That they appeared before the equalization board to have said assessment canceled, but said board refused to do so, and returned the assessor's books to the county auditor with said assessment unchanged. Plaintiff Burns is a resident of said incorporated town. Plaintiff Webster is a resident of Cresco, in the same county. Plaintiffs, as the executors of said estate, were on January 1, 1892, and ever since have been the joint possessors of moneys and credits of said estate in the sum of about fifteen thousand dollars. That the incorporated towns of Lime Springs Station and Cresco are separate assessment districts in Howard county. That the classification of this kind of property by the board of supervisors of said county for 1892 was on the basis of one third of its value. That most of the funds of said estate consisted of notes and mortgages for money which had been loaned out by Hastings in his lifetime, and by his executors under his will, and by order of court; and all such notes and mortgages were, on and prior to January 1, 1892, kept at Cresco, under the immediate control of said Webster, one of the executors. That at the same time there was about one thousand, one hundred dollars in money belonging to said estate on deposit in a bank at Cresco in the name

of said executors. That Burns had in his possession at Lime Springs Station about one hundred and fifty dollars belonging to said estate. That said one thousand, one hundred dollars, and said notes and mortgages, while under the control of both executors, had been taken to Cresco, because Webster, by agreement between him and Burns, was to look after the investment of the funds belonging to the estate, and Burns was to have charge of the real estate of the deceased. That the assessment of five thousand dollars on the estate's moneys and credits was made by the assessor of Lime Springs Station without the knowledge or consent of the executors. That the same estate was assessed for the same year, in the same amount, on the same moneys and credits, in the town of Cresco, except the one hundred and fifty dollars which was in Burns' hands at Lime Springs Station. On appeal to the district court defendants moved to dismiss the appeal, claiming that plaintiffs never appeared before the board of equalization of Lime Springs Station to object to the assessment, and that the board never acted on said assessment, and there was nothing to appeal from. The motion was overruled, and the court ordered the assessment reduced to fifty dollars. From this action of the court the appeal is prosecuted.

II. There is but one question of fact in this case upon which the parties are not agreed. It is contended by plaintiffs that they appeared before the board of equalization of the incorporated town of Lime Springs Station at the proper time, and objected to the assessment. Defendants deny that any sufficient objection was ever made. As the right of appeal to the district court is obtained only by an appearance before the board of equalization, and the making of proper objections to the assessment, it is necessary to determine the question thus presented. The statute provides: "The township trustees shall constitute a board of equaliza-

tion for their respective townships and have power to equalize the assessments of all taxpayers within the same, except in such cities and incorporated towns as elect a township assessor, in which case the city council shall be the board of equalization, and shall perform such duties in substantially the same manner as is required of a township board of equalization, by increasing or diminishing the valuation of any piece of property, or the entire assessment of any taxpayer, as they may deem just and necessary for an equitable distribution of the burden of taxation upon all the property of the township: provided that such boards shall keep a record of their proceedings." Code, section 829. "Any person who may feel aggrieved at anything in the assessment of his property, may appear before said board of equalization in person, or by agent, at time and place mentioned in the preceding section and have the same corrected in such manner as to said board may seem just and equitable, and the assessors shall meet with said board and correct the assessment books as they may direct. Appeals may be taken from all boards of equalization to the district court of the county wherein the assessment is made, within sixty days after the adjournment of such board of equalization, but not afterward." *Id.*, section 831. Plaintiff Burns testified that he went before the board of equalization at their meeting in April. That they asked him what he was going to do about the assessment. He told them he did not know; that it had been assessed in Cresco. That they asked him what it was put in at there, and he told them five thousand dollars. They said they would put it in, and said something about letting the board of supervisors settle it.

"Q. You objected to the assessment as they had it at that time? A. I told them I had been assessed in Cresco, and I supposed that was objection enough.

I didn't get up and kick any about it, but told them I didn't want to pay taxes in two places."

McNally, for defendants, testified: That Burns came before the equalization board. That the board took no action on the matter. That Burns said he understood they had assessed it in Cresco, but he didn't object to our putting it in, because he thought the board of supervisors would attend to it, so it wouldn't be assessed in two places. He did not ask that the assessment be revised or modified. That the board of equalization knew it was assessed at Cresco, and it would be a double assessment. We supposed the board of supervisors would act on it. It seemed to be the opinion that the board of supervisors were the proper parties to act on it. Our board thought so. The foregoing is the substance of the testimony touching the acts of plaintiffs before the board of equalization.

It will be observed that the law does not limit the right of appeal in such cases from a judgment or order of the board. Nor does it require any particular form of objection to be made by the aggrieved party. He must appear, and if, when he so appears before the board of equalization, he in any form makes his grievance known to the board, it is sufficient to give him his right to appeal from its action if it be unfavorable to him. If his grievance is understood by the board, it matters not as to the manner in which he presents his case. The board is not a court. The statute requires no pleadings or papers to be filed presenting his objection to the assessment. The proceedings are intended to be, and are, in fact, informal. The statute is intended to afford to an aggrieved taxpayer an opportunity to ask and have a correction of an assessment, and no formalities are required as to the manner of bringing the matter before the board. He expressly informed the board that the same property had already been assessed at Cresco; that he did not want to pay taxes twice on the

same property. This was well understood by the board, and was a sufficient presentation of his grievance. With these facts before them, it became their duty to act in the matter. It was not plaintiffs' fault if the board neglected to make a record of their application, nor could they, by neglecting to act after the matter had been properly called to their attention, deprive plaintiffs of their right to appeal. Plaintiffs had done all that the law required, they had appeared, had made their grievance known to the board, and they could not be robbed of their right to appeal by a failure of the board to act as the law requires. Their failure to act was, in law, a refusal to grant plaintiffs' request, from which an appeal will lie.

Counsel for appellants rely upon several cases decided by this court. They will be found unlike the case at bar. In *Smith v. City of Marshalltown*, 86 Iowa, 516, 53 N. W. Rep. 286, plaintiff never appeared before the board. In *Meyer v. Dubuque Co.*, 43 Iowa, 592, plaintiff sought by *mandamus* to compel the board of supervisors to cancel his assessment. The board of equalization had refused so to do. It was held the writ should not issue, as the board had already acted upon the assessment. See *Davis v. City of Clinton*, 55 Iowa, 549, 8 N. W. Rep. 423; *Hutchinson v. Board*, 66 Iowa, 35, 23 N. W. Rep. 249. The court below properly overruled the motion to dismiss the appeal.

III. The principal question is, where should the moneys and credits of the estate of Hastings be assessed, in view of the facts we have heretofore stated? It may aid us in determining this question to briefly set forth the substance of the statutory provisions applicable to the listing of such property, and also relating to the duty of the assessor, and the one having such property in his possession. Code, section 803, provides that one who is the owner, or who has the control or management, of property, shall assist the assessor in listing the

same; also that the personal property of a decedent shall be returned by the executor. *Id.*, section 805, provides that "any person required to list property belonging to another shall list it in the same county in which he would be required to do if it were his own, except as herein otherwise directed, * * * giving the assessor the name of the person or estate to whom it belongs." Section 817 requires one acting as an agent, and having in his possession or under his control personal property, to return the same for taxation. Section 822 requires every person who is compelled by law to list property belonging to another to assist the assessor in making the assessment. Section 823 provides that "the assessor shall list every person in his township, and assess all the property, personal and real, therein, except such as is heretofore specifically exempted," and fixes a penalty for refusing to assist in listing property, as well as for refusing to take the prescribed oath. In *McGregor's Ex'rs v. Vanel*, 24 Iowa, 439, sections 714 and 716 of the Revision were construed. These sections are in substance the same as Code, sections 803, 805. It was therein held that where the executor resided in a county other than that in which the decedent died, and in which administration was granted, that personal property of the decedent should, as a rule, be assessed in the county of which decedent died a resident.

The decision is based upon the thought that the executors represent the decedent. In *Cameron v. City of Burlington*, 56 Iowa, 322, 9 N. W. Rep. 239, the decedent died a resident of the city of Burlington. Plaintiff, a resident of another township in the same county, was appointed administrator of his estate, and had in his possession certain notes of the estate. These notes were assessed in both the township where the administrator resided and also in the city of Burlington. In construing the sections of the Code which we have referred to, the court said: "The property which he

is required by law to assist in listing, as distinguished from his own, includes personal property which he holds in a fiduciary capacity as executor or trustee. It seems to us clear that the statute was designed to provide that the assessor of each township may demand of every executor residing in the township a list of the personal property held by him as executor in the township, under penalty of a fine. To say that this is not so except when the deceased died in the township is to impose a qualification upon the statute by judicial construction for which we find no warrant. It is manifest that the important consideration is not so much the comparative rights of the different townships as the certainty that all property shall be taxed once, and only once. To secure this certainty we must presume was the object of the statute. But this can not be secured under the rule contended for by appellees, unless assessors are to be sent into foreign townships in search of taxpayers and property." The court then considers the rule in *McGregor's Ex'rs v. Vanel*, above cited, and, while not expressly overruling that case, refuses to apply the rule therein laid down, and holds that the property should be assessed in the township where the administrator resides. Other cases are cited by counsel, but these two are chiefly relied upon by the respective parties to the suit. It will be seen that the facts in the case at bar are in some respects different from those in either of the cited cases. Here we have two executors, each having possession of some of the personal property of the estate,—though the one in *Cresco* has most of it,—and each residing in different taxing districts. The circumstances surrounding the situation, location, and use of the personal property left by a decedent, are so different in each case presented that it is difficult, if not impossible, to lay down an inflexible rule, alike applicable to all cases. We think, however, that the true rule in a case like that at bar,

where there are two executors, both having actual possession of personal property of the decedent, and both residing in the same county, but in different taxing districts, is that each should return to the assessor of his township for taxation such personal property of the decedent as may be in his immediate possession in his township. This would seem to be in compliance with the statute, which contemplates that any person having possession of personal property of another shall list it at the place in which he would be required to do if it were his own. Code, section 805. We do not mean to be understood as holding that personal property which, though in possession of an executor of a decedent, has a fixed and abiding place or location in another township than that of the executor's residence, would necessarily be taxable in the township of the executor's residence. To illustrate: Suppose a man should die, leaving a large amount of personal property in the township of A., and an executor is appointed, who also lives in that township; and suppose decedent also left personal property consisting of a stock of goods in the township of B., where he had carried on business,—in such a case it could not be said that, because the executor lived in the township of A., therefore the stock of goods which had been habitually used for the purpose of merchandising in B. should be assessed in the township of the executor's residence.

Counsel for appellants also rely upon *Ament v. Humphrey*, 3 G. Greene, 255, and *Lemp v. Hastings*, 4 G. Greene, 448. The first of these cases was decided under a statute materially different from that now in force, and the case was one wherein a merchant residing in one assessment district carried on a business with a stock of goods in another taxing district. It was sought to assess his stock of goods in the district of his residence, which the court held could not be done under the statute. The *Lemp* case was similar

in its facts, and was decided under the Code of 1851. If it be conceded that the statute of 1851 is substantially like that now in force, our holding is not in conflict with the *Lemp case*. That was a case where the party in a taxing district other than that in which he resided carried on a merchandising business. The property was located in the other township. It was its fixed and abiding place, necessarily so, for the purpose for which it was used. We do not doubt that in such a case the goods would, under our present law, be held taxable in the taxing district where they were situated. The case in its facts is not like that at bar. Nor does our opinion conflict with the holding in *Hunter v. Board*, 33 Iowa, 376. In that case the owner of the property (notes) resided in this state. The notes were left in Illinois for safe-keeping. It was held that the money due on the notes was what was assessed, that the notes were but evidences of the debt, that the debt vested in the owner wherever he resided. The legal title in the case at bar to the personal property when the assessment was made was in the executors. They alone (subject to the order of the court) had power to collect and control it. We do not hold that the mere fact that personal property is in a certain taxing district at the time an assessment is required to be made, of itself, without more, determines that it must be assessed in that district. What we do hold is that in a case like that at bar personal property in possession of an executor in the township of his residence is taxable there. Therefore the decision of the district court was right in assessing to plaintiff Burns, as executor, in the incorporated town of Lime Springs Station, the personal property actually in his possession in that town. The balance of the personal property being in possession of the other executor in Cresco, and, it being the place of his residence, it was properly assessed there. It is possible that any rule which

might be established in cases of this character would not always effectuate justice, but the one we have announced accords with our view of the meaning of the statute, and it is by this we must be guided. The judgment of the district court is **AFFIRMED**.

F. I. MOFFET v. HORACE MOFFET, Appellant.

Admission in Answer: Burden of Proof. In conversion, where the taking is admitted and the defense is payment to an agent, defendant must prove the agency, and a charge that plaintiff can not recover without proving all the material allegations of the petition, is erroneous. (1)

AGENCY: PROOF OF. Agency to sell property is not made out by showing permission by an employer to a hired man and relative to buy goods and have them charged. (2)

SAME. On the issue of agency, conduct of the alleged principal tending to prove it is admissible, though not known to one who deals with the alleged agent, but on the issue of holding one out as an agent by the conduct of the principal, it must appear, that those who dealt with the agent knew of and relied upon such conduct. (3)

Appeal from Cedar District Court.—HON. JAMES D. GIFFEN, Judge.

WEDNESDAY, FEBRUARY 7, 1894.

AN ACTION to recover the value of five hundred and twenty-three bushels of corn, taken by the defendant from plaintiff's farm in Cedar county. From a judgment below for the plaintiff, the defendant appealed.—*Reversed*.

Wolf & Hanley and R. G. Cousins for appellant.

Wheeler & Moffit for appellee.

GRANGER, C. J.—I. The issues should be definitely understood, in order to properly consider the legal import of an instruction given by the court as to

the burden of proof, of which complaint is made. In the petition, after stating that plaintiff owned the land where the corn was, it is stated "that defendant took from said cribs five hundred and twenty-three bushels of corn, the property of plaintiff, and of the reasonable market value of one hundred and twenty dollars and twenty-nine cents, and converted said corn to his own use, and refuses to pay plaintiff for the same; that there is now due plaintiff by defendant for said corn one hundred and twenty dollars and twenty-nine cents, no part of which has been paid, and interest thereon at six per cent;" then a prayer for judgment. The answer denies each and every allegation of plaintiff's petition, but admits that he purchased from one Ferguson, who had charge of the farm and property of this plaintiff, and was the authorized and acting agent of the plaintiff, five hundred bushels of corn at twenty-one cents per bushel; alleges the fact to be that he paid plaintiff's agent in full for all corn purchased; denies that he is indebted to plaintiff in any sum whatever. The answer admits receiving five hundred bushels of plaintiff's corn, and by way of affirmative defense it states that the corn was purchased of plaintiff's authorized agent, and payment was made to him therefor. These averments are considered as controverted without a reply. Code, section 2712; *Bank v. Perry*, 72 Iowa, 15, 33 N. W. Rep. 341. Upon a proposition for judgment upon the pleadings, without evidence, the plaintiff would have been entitled to the value of the five hundred bushels of corn at twenty-one cents per bushel, for defendant admits receiving that much of plaintiff's corn of that value. To avoid this, he must show—what he averred—that Ferguson was an authorized agent for that purpose, and that payment was made to him. The only instruction by the court on the burden of proof is as follows: "(4) The plaintiff has the burden of proof, and it devolves on

him to satisfy you of the truth of the material allegations of his petition by a fair preponderance of evidence; and if he has not done so you would find for defendant." It will be seen that the instruction deprives plaintiff entirely of the benefit of the admission in the answer, and required him to make proofs of the material allegations of his petition, or permit a verdict for defendant, when, without any proof, he was entitled to judgment. Nothing in the submission of the cause seems to render this error without prejudice. It is true that on the trial the testimony was mainly directed to the fact of the agency of Ferguson, and the jury was directed to find whether or not he was such agent, or was by the plaintiff held out as such in a manner to render the plaintiff liable for his acts; but the instructions nowhere place the burden of showing such fact on the defendant. We might say that he should not now complain, because he did not ask an instruction, but for the error in the instruction given, which operated to deny the plaintiff a right to which he was entitled under the admitted facts.

II. A few suggestions as to the evidence may be important in case of another trial of this cause. The plaintiff gave direct evidence to the effect that his corn was taken without his consent; that defendant told him he had got five hundred and twenty-three bushels of it; that he still owed him for it, and gave the market value. On cross-examination, after stating that Ferguson was his nephew, and had been living with him some weeks before he left the farm; that he did chores like a hired man, and, if a sack of flour was needed, he was sent for it, he was asked: "Did James go to town, and buy things, and have them charged to you, while he lived with you?" The question was held to be proper cross-examination, and material. We think it is neither. A proper answer to the question could have no bearing whatever on the testimony given

on the direct examination; nor would it tend to show the fact of agency, if such an inquiry would, at that stage of the trial, be proper. Permission to a son, a hired man, or one living with another, to get things at a store, and have them charged, is in no sense authority, nor does it tend to show authority, to sell his property.

III. It appears from the record that the fact of agency is sought to be shown in two ways: *First*. An actual authority to Ferguson to sell the corn; and, *second*, that he was so held out to the public as to authorize the understanding that he was such agent. There was evidence admitted of facts and declarations not within the knowledge of defendant, when he bought the corn, and appellant urges that, because of such want of knowledge, they were immaterial, and could not have been relied upon in making the purchase. If the testimony established the fact of the agency, it was proper, whether known or not, for the actual agency would protect the defendant, regardless of any knowledge he had on the subject. If, however, the transaction is to be justified, not by the fact of agency, but because of the conduct of the plaintiff in holding Ferguson out as such, the defendant must have purchased relying on such conduct, and previous knowledge would have been requisite. As the fact of agency was involved in the trial, the testimony was not improper, because of the reasons suggested. These suggestions will indicate our view as to an instruction presenting a similar question. We may further say that we think there is no testimony to authorize the giving of the seventh instruction. The judgment is REVERSED.

THE TABOR & NORTHERN RAILWAY COMPANY, Appellant,
v. S. F. McCORMICK.

Written Subscription to Railway Stock. Where a subscription is payable when cars are running and the road is completed from a certain town, and it is completed from a point nine hundred and fifty feet from the limits of that town, evidence as to the accessibility of this terminus and its being satisfactory to the public is inadmissible. (2)

Construction of Agreement by Defendant. So is testimony that defendant, having been promised money for land to be payable when the road was completed from that town, had demanded the money. (2)

Compliance with Agreement: Good Faith. Where the road also built a track from its main line to said town in which it built a platform, it should have been permitted to show, on the issue of good faith, what it had done in accommodating passenger traffic and that all demands of business at that point had been complied with. (2)

SAME. On that issue it was proper to admit statements of plaintiff's president as to whether the extension was expected to be permanent and, *per contra*, that the lease of the ground for the extension was for but a year. (2)

SAME. While plaintiff was not required to place all its terminal facilities within said town, it was its duty to arrange for the doing of its principal business at a point therein. Placing its principal place of business just outside so as to attract the principal business of the town from the agreed terminus, would defeat the very object of the subscription. (3)

Variance by Parol. Parol promises and representations inducing a written subscription, can not vary the writing where there is neither plea nor proof of fraud. (3)

Appeal from Fremont District Court.—HON. N. W. MACY, Judge.

THURSDAY, FEBRUARY 8, 1894.

ACTION in two counts to recover on two written subscriptions made by the defendant to the capital stock of said company, "to be paid when railroad is completed and cars running from Tabor to Malvern,

Iowa." Plaintiff alleges compliance with said condition, that defendant refuses to pay, and makes profert of the certificates of stock, and asks to recover. Defendant answers that it is provided in plaintiff's articles of incorporation that the road should be built "from within the corporate limits of Tabor, Fremont county, Iowa," that he made said subscriptions upon the agreement, understanding, and representations that the road would be so completed and operated, and denies that it has been so completed and operated. The defendant also set up a counterclaim for rent that is not disputed. The case was tried to a jury, and a verdict returned for the defendant. Plaintiff appeals.—*Reversed*.

George E. Draper for appellant.

A. R. Anderson and *W. E. Mitchell* for appellee.

GIVEN, J.—I. The following facts are unquestioned: The articles under which plaintiff is incorporated show that it was incorporated "to construct a railroad from within the corporate limits of Tabor, Fremont county, Iowa, to either Hillsdale, Malvern, or Glenwood." Defendant's subscriptions are conditioned "to be paid when the railroad is completed and cars running from Tabor to Malvern." The north line of the town of Tabor, as originally incorporated, was on the county line between Fremont and Mills counties. The plaintiff completed, and has since continuously operated, its road from a point in Mills county, about nine hundred and fifty feet north of the county line, about one hundred and fifty feet east of the continuation of Main street, in the town of Tabor, and about two thousand, one hundred feet from the business center of the town, in a northeasterly direction, to the town of Malvern. At the point named, the plaintiff constructed a depot, a turntable, engine house, and other terminal facilities. Afterwards, in 1890, the

plaintiff constructed a track from a point on its main line about fifteen rods east of said depot, in a southwesterly direction, to a point in Fremont county, and within the original limits of the town of Tabor. A platform was constructed at the end of this new track, and some business transacted there. Prior to the time the defendant made his subscriptions, steps had been taken to extend the limits of the town of Tabor over certain adjoining territory in Mills county, including that where said depot and terminal facilities were located, and a proclamation had been issued by the mayor declaring said territory duly annexed to the town. Since the trial of this case below, this court held said proceeding to be illegal. *Railway Co. v. Dyson*, 86 Iowa, 310, 53 N. W. Rep. 245.

Plaintiff contends that the completion and operation of the road from the point where said terminal facilities were located in Mills county was a compliance with the condition upon which the subscriptions were payable; also, that, if said completion and operation was not a compliance, that the construction and operation of the extension to the point within the limits of Tabor, and into Fremont county, was a compliance with said condition. Defendant contends that, under the articles of incorporation and the language of his subscriptions, said subscriptions are only payable when the road is completed and operated from a point in Fremont county within the corporate limits of the town of Tabor, and that the completion and operation of the road from the point in Mills county was not a compliance with the condition. He also contended, on the trial, that the attempt to extend the limits of the town was illegal, and did not bring the original terminal within the conditions nor within Fremont county, and that said extension of the road was not made in good faith, and was not completed and operated as contemplated in the contract. He also claims that he was

induced to sign said subscriptions upon representations of the plaintiff's officers that the depot and termini were to be located in Fremont county, within the limits of the town of Tabor.

II. Plaintiff's first complaint is of certain rulings in the taking of testimony. The rights of these parties must be measured by their contract. There was no error, therefore, in refusing evidence as to the accessibility of the original termini, or as to whether or not it was satisfactory to the public. Plaintiff sought to prove what it had done in the way of receiving and delivering passengers and freight, as requested or necessary to be delivered, at the terminus in Fremont county, and that all the demand for business at that point had been complied with. To these questions, defendant's objections were sustained. If the extension of the road into Fremont county was in good faith, and as contemplated by the contract, it was a compliance with the conditions as claimed by the defendant. Whether or not that extension was made in good faith was a question in the case upon which evidence was introduced as to the manner in which the track was constructed, and the conveniences provided, at the point in Fremont county. We think this evidence should also have been admitted. For the same reason, there was no error in admitting, over plaintiff's objection, the statements of the president of the road as to whether said extension was expected to be continued, nor the evidence that said track was laid upon ground leased for a period of one year. Plaintiff complains that on cross-examination of the defendant it was not permitted to show by him that he had contracted to deed property upon the completion of the road from Tabor to Malvern, and to receive an extra one hundred dollars when so completed, and that he had demanded the money, insisting that the road was so completed. There was no error in excluding this evidence. What

was required of the plaintiff is to be determined by the contract as written, and not by contracts of the defendant with other persons. Such contracts are too remote, and defendant's construction of them was not evidence against him in this case.

III. The court properly instructed that the parties are presumed to have contracted with reference to the articles of incorporation, and construed the subscriptions, in the light of the articles, as requiring the termini to be within the corporate limits of the town of Tabor, "unless conditions were attached thereto other than therein expressed." The court submitted the question whether, prior to the execution and delivery of the subscriptions, the plaintiff's officers or agents represented to defendant that the road would be built and operated from a point in Fremont county, within the limits of the town of Tabor, and instructed that, if such representations were made and relied upon, they became conditions of the subscriptions, and that in that case the plaintiff must show compliance therewith. We think it was error to submit this question, and to so instruct. The contract was in writing, and could not be varied by preceding representations, unless fraudulently made. There is neither allegation nor proof that the alleged representations were fraudulently made. The court also instructed that, if the termini were to be in Fremont county and in Tabor, "it would not be required to place all its terminal facilities for said town at such point, but it would have to so build and operate its road, and so arrange its terminal facilities, as that the principal business and traffic of said road at the station for said town would be transacted at a point within its corporate limits in said county." There was no error in this instruction. For plaintiff to maintain a depot just outside the corporate limits so as to attract the principal business of the town from the agreed termini would defeat the very object of the condition. For the reasons stated, the judgment is REVERSED.

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110	445
90	451
124	582

C. M. WITT v. H. O. RICE *et al.*, Appellants.

Mortgage: FRAUDULENT INSERTIONS: EVIDENCE CONSIDERED. A mortgagor and his wife testified that certain lands to which he had a bond for deed were fraudulently put into the mortgage, in which they were corroborated by entries and a cancellation made on the bond. The application for the loan included the land in question, and so did the mortgage for commission. The conveyancee, the mortgagee and another testified that the instrument was unchanged, which claim is borne out by its inspection. The last two also testified that the mortgagor and wife fully understood what the mortgage covered. *Held*, that defendant's claim was not established. (2)

Subrogation: Payment on Assumed Debt. Where one buys the equity in land held on bond for deed, agreeing to pay what is due on the bond, the land bought being also mortgaged, he can not against foreclosure of the mortgage, be subrogated to the rights of the holder of the bond to the extent of what he has paid upon it. Assuming the bond, made what was due upon it a primary liability of the assumer, in which case there can be no subrogation. (3)

Alienation: Mortgaged Property. Where a part of mortgaged property is alienated, it must bear the mortgage debt *pro rata*, according to value to be ascertained without regard to improvement by the purchaser, made after the giving of the mortgage. (5)

SAME: EXHAUSTING LAND NOT ALIENATED. When the mortgagor has no title left in the mortgaged property when the mortgage is foreclosed, the rule that unsold mortgaged property shall first be exhausted, has no application. (4)

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, FEBRUARY, 8, 1894.

ACTION in equity to foreclose a mortgage. Judgment and decree for plaintiff. Defendants appeal.—*Affirmed.*

Flickinger Bros. for appellants.

Shea & Galvin for appellee.

KINNE, J.—I. This record discloses the following facts: On December 1, 1885, the defendant H. O. Rice owned in fee the southwest quarter of section 28, the east half of southeast quarter of section 29, and east half of northeast quarter of section 32, township 76, range 41; and he held a bond for a deed of the northwest quarter of section 28, township 76, range 41, from one Adolph Graffen, which tract will hereafter be referred to as the Graffen quarter. This bond provided for the conveyance of the fee title on the payment by H. O. Rice of two thousand and fifty dollars, such conveyance to be made subject to two mortgages, aggregating one thousand, seven hundred dollars and interest, which Rice assumed and agreed to pay, making the total consideration three thousand, seven hundred and fifty dollars. December 1, 1885, there was still due on this Graffen quarter about three thousand, five hundred dollars. Rice procured a loan running to one Squire, trustee, for five thousand dollars, and executed his note therefor, secured by a mortgage upon all the real estate heretofore described, including the Graffen quarter. After this, H. O. Rice sold his equity in the north eighty acres of the Graffen quarter to his brother, T. M. Rice, who took possession, and has since occupied the land as a farm, and has paid in all about one thousand, eight hundred dollars on the purchase price, as provided in said bond, and has also made improvements of the value of several hundred dollars. May 24, 1886, H. O. Rice executed to one Clapp a mortgage for two thousand, six hundred and ninety one dollars on all the land described in the Squire mortgage, except the Graffen quarter. On September 30, 1886, H. O. Rice executed to C. D. Dillin a mortgage for one thousand, one hundred and twenty dollars on same land that was embraced in the Clapp mortgage. November 27, 1886, H. O. Rice executed to C. M. Witt a mortgage for five hundred and sixteen

dollars and forty-three cents on same land as that included in the Clapp and Dillin mortgages. The Clapp mortgage was assigned to Lodge & Henry, and by them foreclosed, and the land covered by it sold to satisfy the judgment recovered in the foreclosure suit; they also having become the owners, by assignment from H. O. Rice, of all his interest in the Graffen contract, subject to the equity of T. M. Rice in the north eighty acres. Lodge & Henry are not parties to this action. March 10, 1890, and within nine months after said sale, C. D. Dillin, as a junior lienholder, redeemed the land from the sale under the Lodge & Henry foreclosure, paying three thousand, six hundred and eighty-eight dollars and fifty-seven cents to the clerk, which was afterward paid Lodge & Henry, and the sheriff's certificate assigned to Dillin. In December, 1885, the five thousand dollar note and mortgage made to Squire as trustee, were sold to the Rutland Savings Bank, and it remained the owner of them until July, 1890. July 8, 1890, the bank began suit in the United States court on said note and mortgage, and on August 6, 1890, plaintiff herein purchased the same, paying therefor five thousand, seven hundred dollars. The case was dismissed, and suit commenced in the state court. Soon after this suit was begun, plaintiff released of record from the lien of the mortgage in suit all of the land included therein, except the Graffen quarter, and credited upon the note two thirds of the amount then due thereon, and asked judgment against Rice for the balance and a decree of foreclosure against the Graffen quarter for the one third remaining due upon the note. H. O. Rice testifies, and the record so shows, that he has no interest in this land. T. M. Rice intervened in the case, and asked, in the event that the Squire mortgage was found to cover the Graffen quarter, that he might be subrogated to the extent of payments made by him on the Graffen contract, and that such payments might

be decreed to be a lien prior to plaintiff's mortgage. The court found for plaintiff, and that he should have judgment for one thousand, six hundred and fifty-one dollars and thirty-six cents, with attorney's fees, costs, and interest, against H. O. Rice, and ordered the mortgage foreclosed for said sum as against said Graffen quarter.

II. It is contended by the defendants that the Graffen quarter was fraudulently put in the Squires mortgage; that it was expressly agreed and understood between all the parties that it should not be embraced therein. Now, it is incumbent upon the defendants to establish this claim. In favor of their contention is the evidence of H. O. Rice and his wife. They are corroborated to some extent by the indorsement and cancellation made upon the Graffen bond. Against this is the testimony of Somers, who drew the mortgage, that it is just as it was drawn by him; of both the Squires that the instrument has never been changed and that Rice and his wife fully understood the mortgage, and what was described therein, when they signed and acknowledged it. Then we have the original mortgage before us, and it clearly appears that no change has ever been made in the description of property therein set forth. Again, on the same day, a mortgage was given to Squires covering the same real estate as the five thousand dollar mortgage, which second one was given for commission on the loan. The application for the loan embraced the Graffen land. It is clear that defendants have failed to establish this defense, and we must hold that the Graffen quarter section was rightfully embraced in the Squire mortgage.

III. T. M. Rice insists upon the right of subrogation as to the money payments made by him to Graffen on the eighty acres of the Graffen land purchased of H. O. Rice. The trial court dismissed his petition of intervention, and must have found that he was not

entitled to be subrogated. Authorities are cited by counsel announcing correct principles of law applicable to the subject of subrogation, but not applicable to the facts as they appear in this case. T. M. Rice purchased the land with record notice of the Squires mortgage thereon. In law, he knew that the Squires mortgage covered this land, subject only to the Graffen claim for purchase money. When he made his several payments to Graffen he had no thought that he could or would be subrogated to Graffen's rights. But it is immaterial as to what T. M. Rice thought. The fact is, he purchased the land of H. O. Rice. He took the latter's place, and stood in his shoes, so far as the obligation to Graffen was concerned, and agreed to pay this Graffen claim as a part of the purchase price of the land; and he did in fact pay part of it. Now, T. M. Rice, by his agreement and acts, made H. O. Rice's debt to Graffen his own. His obligation to Graffen became an actual primary liability, and in such a case the right of subrogation does not exist. *Sheld. Subr.* section 26; 3 *Pom. Eq. Jur.*, section 1212, note 1; *Id.* section 1213; *Goodyear v. Goodyear*, 72 Iowa, 329, 33 N. W. Rep. 142; *Kellogg v. Colby*, 83 Iowa, 513, 49 N. W. Rep. 1001.

IV. It is said that plaintiff must exhaust the three hundred and twenty acres of land before he can proceed to sell the Graffen land under the mortgage. It is not necessary to discuss the rule contended for. If it be correct, still, when applied to the facts of this case, it does not impose such a duty upon the plaintiff. The rule contended for requires the plaintiff to enforce his judgment by levying upon and selling land which H. O. Rice still owns, and would permit the land purchased by T. M. Rice to be sold for any balance remaining after thus exhausting the other mortgaged property. Now, this record shows that H. O. Rice has no title to any of this land, and has not owned it for some time. His interest therein has passed to other parties who

have become purchasers of the property. Hence it is not a case where the rule is applicable.

V. Lastly, it is claimed that the court below charged too much of the incumbrance to the Graffen quarter. Plaintiff credited two thirds of the amount due on his mortgage as paid by reason of the release by him of the half section, and asked a decree foreclosing his mortgage against the Graffen quarter section for one third of the mortgage debt. The district court found that the Graffen quarter should bear five seventeenths of the entire mortgaged debt, and entered a decree accordingly. The established rule in this state is that when mortgaged property is alienated it must bear its share of the mortgage debt *pro rata* according to value, and without regard to improvements placed thereon by purchasers subsequent to the time of the execution of the mortgage. *Bates v. Ruddick*, 2 Iowa, 423; *Massie v. Wilson*, 16 Iowa, 390; *Taylor v. Short's Adm'r*, 27 Iowa, 361; *Barney v. Myers*, 28 Iowa, 472; *Tufts v. Stanley*, 42 Iowa, 628; *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. Rep. 252. Under the evidence, we think the court was justified in its finding. True, the rule in this particular case seems to work a hardship in requiring the value of the land to be ascertained without regard to the amount actually paid thereon at the time the mortgage was made. But the rule has been too long established to be set aside because in its enforcement an occasional injustice may seem to result; besides, it is doubtful if any rule could be established which would in all cases prove satisfactory. We see no reason for disturbing the judgment below, and it will be **AFFIRMED**.

ADA KIRKMAN V. THE FARMERS' INSURANCE COMPANY,
Appellant.

Fire Insurance: Proof of Loss: WAIVER. An acknowledgement of notice of loss, coupled with a statement that, "the claim will receive prompt attention," does not waive a condition in the policy requiring proof of loss within sixty days.

SAME. After the sixty days were past, claimant wrote the company stating amount of loss, that notice had been given it and acknowledged, that the policy was burned, asking for a blank copy of it, and, "if the matter will be settled without suit, please inform me, if not, we desire suit to commence at once." In reply a copy of policy was sent with the statement that no proof of loss had been received. Still later, formal proofs were sent with an inquiry whether the same were satisfactory and whether the loss would be paid, to which no reply was made. *Held*, that this did not tend to waive the stipulated proof of loss.

SAME: ADJUSTER. Under a policy making it an express condition that none of its provisions could be waived, except in writing by the secretary, an adjuster can not orally waive proof of loss required by the policy.

Appeal from Monroe District Court.—HON. W. I. BABB,
Judge.

THURSDAY, FEBRUARY 8, 1894.

ACTION on a policy of insurance against loss by fire. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

Henry L. Dashiell for appellant.

T. B. Perry for appellee.

ROTHROCK, J.—The property insured was a frame dwelling house, and certain household furniture and personal property kept and used in the house. The policy was issued on the twenty-fifth day of January,

90	457
92	395
90	457
98	528
100	176
100	180
100	395
90	457
102	501
90	457
108	341
90	457
107	743
90	457
110	426
110	427
90	457
126	228
126	229

1890, and the amount of the insurance was four hundred and twenty-five dollars. The property was totally destroyed by fire on the twenty-seventh day of June, 1890. The policy provides that, in case of loss of the property by fire, "the assured shall forthwith give notice of said loss to the secretary of the company, and within sixty days render a particular account of such loss, signed and sworn to by the assured, stating when and how the loss originated, the nature of the title, and interest of the assured and all others in the property." The application for the insurance was taken by one Mullen, a local agent of the defendant, who was a mere soliciting agent, without authority to issue policies. The day after the fire, the husband of plaintiff called upon Mullen, and advised him of the loss, and Mullen wrote a letter to the company at Cedar Rapids, giving notice of the loss. It is conceded that no proof of loss such as was required by the policy was made within sixty days after the fire. The plaintiff claims that formal proof of loss was waived by the defendant. In our opinion, the determination of this question is decisive of the case, and no other question need be considered. The defendant introduced no evidence on the trial, and, after the plaintiff had introduced her evidence, the defendant made a motion for a verdict against the plaintiff, one ground of which was as follows: "The proofs of loss were not furnished in sixty days after the loss, as required in the contract and the statute, and there is no evidence of any waiver of the same by the defendant." The motion was overruled, and the court charged the jury, and a verdict was returned for the plaintiff.

The claim of waiver of proofs of loss is based upon the acts of the officers and agents of the company by which the plaintiff was induced to believe that no proofs of loss were required. There is nothing in the evidence by which any waiver, founded upon the

acts or declarations of the agent Mullen could be inferred. Moreover, he was a mere soliciting agent, with no power to issue policies or bind the company by a contract of insurance. Agents possessing the limited power of soliciting insurance, delivering policies, and receiving premiums can not waive conditions and forfeitures. *Viele v. Insurance Co.*, 26 Iowa, 9; *Armstrong v. Insurance Co.*, 61 Iowa, 212, 16 N. W. 94; *Garretson v. Insurance Co.*, 81 Iowa, 727, 45 N. W. Rep. 1047. The letter written by the soliciting agent was received at the general office, and was answered by a postal card in these words:

“OFFICE OF FARMERS' INS. CO.

“CEDAR RAPIDS, IOWA, June 30, 1890.

“DEAR SIR:—Your notice claiming loss on your policy No. 178,879 has been received, and will receive prompt attention. Yours, truly,

“J. H. SMITH, Prest.”

No other communication was had with the home office until November 9, 1891, long after the expiration of the sixty days in which proofs of loss should have been made, when the following correspondence was had:

“ALBIA, IOWA, November 9, 1891.

“J. H. Smith, President Farmers' Insurance Co., Cedar Rapids, Iowa:

“Mr. Douglass Kirkman, husband of Mrs. Ada Kirkman, informs me that, on the twenty-seventh of June last, Mrs. Ada Kirkman sustained a loss by fire of her property insured with your company by policy No. 178,879. He says he has given you notice of the loss, receipt of which was acknowledged by you June thirtieth last. The policy was destroyed by the fire along with the property insured. The amount of the insurance was \$425, which he claims his wife has sustained by the fire, and this amount he claims of your

company as the damage due his wife on the policy. If the matter will be settled without suit, please inform me. If not, we desire suit to commence at once. Will you please furnish me a copy of his policy, the original having been destroyed in the fire, and he will pay the expense.

T. B. PERRY."

"CEDAR RAPIDS, IOWA, 11—12—'90.

"*T. B. Perry, Albia, Iowa:*

"As per your request of tenth inst., we herewith inclose you copy of policy issued to Mrs. Ada Kirkman, having date January 23, 1890, No. 187,879. No proof or affidavit of any loss sustained under this policy has been received by the company.

"J. H. SMITH, President."

On the fifteenth day of November, 1890, plaintiff's counsel transmitted formal proofs of loss to the defendant, with a letter inquiring whether the proofs were satisfactory, and whether the loss would be paid. The defendant made no reply. It is claimed that the postal card was an implied waiver of proofs of loss, because it was stated therein that the matter would "receive prompt attention." We do not think that this was a waiver of any act necessary to be done by the plaintiff. It was surely not necessary that the answer to the notice of loss should call the attention of the insured to the plain provision of the policy that required proofs of loss within sixty days. The president of the company might well say that prompt attention would be given, without waiving any part of the contract. The postal card was nothing more than notice that the company would give prompt attention in the performance of its contract. The correspondence which took place in November, as we view it, does not tend to prove a waiver of proof of loss. Plaintiff's counsel is a lawyer of undoubted experience and ability. He founds his claim of waiver upon the fact that the president of the company did not fully answer his letter. It is true, the

answer did not state that the matter would not be settled without suit. But the furnishing of a copy of the policy was to enable counsel to commence the threatened suit, and the statement that no proof of loss had been made was not an intimation that, if it should be made after that, the time of making it would be waived. It was rather an intimation to the learned counsel that he would likely fail in sustaining an action. It is further claimed that one J. H. Stahl was an agent of the defendant, known as an adjuster of losses, and that within sixty days, and on the eighth day of July, 1890, he appeared upon the premises where the property which was destroyed was situated, and that in conversation with the plaintiff and her husband he waived proof of loss, and stated that the insured had done all that was required for them to do, and that the defendant would settle the loss in sixty days. There is some doubt as to whether there was evidence sufficient to authorize a finding that Stahl was an adjusting agent, or that he was clothed with power to waive any stipulation in the policy. This question we need not consider, because the policy in suit contains this provision: "It is expressly provided that no officer, agent, or employee of this company, or any other person, can in any manner waive any of the conditions, provisions, or requirements of this policy, except the secretary, and he only in writing hereon; and this policy is made and accepted on the above express conditions." There is no question as to the rights of the parties under such a contract as this. There is no statute of this state by which insurance companies are bound by all the acts of the agents which they send out to deal with the public, and the courts can not say that a contract limiting the power and authority of agents is void. The plaintiff in this case must be held to have assented to this stipulation in the policy, and, for aught that appears, she is bound thereby. *Zimmerman v. Insurance Co.*, 77 Iowa,

691, 42 N. W. Rep. 462; *Cleaver v. Insurance Co.*, 32 N. W. Rep. (Mich.) 660; *Hankins v. Insurance Co.*, 35 N. W. Rep. (Wis.) 34. We have disposed of this question of waiver without determining whether the president of the company, notwithstanding the terms of the policy, had the power to make a valid waiver of its conditions. As we have said, we do not regard either the postal card or letter as evidence of a waiver. As to the declarations of the agent Stahl, it is clear from the above named cases, and many others that might be cited, that he had no authority to waive proofs of loss. We think the motion to direct a verdict for the defendant should have been sustained. REVERSED.

C. W. COFFMAN, Administrator v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Coupling Cars: Negligence. Plaintiff's theory being that the brakeman was injured because two couplings were misfits and thus permitted the cars, unsupplied with bumpers, to come together, and that he stood between them when they met, there should be judgment *non obstante* where special findings show that decedent's signals for backing were obeyed, that he knew the kind of cars he was to couple, had coupled such before, and had been told how to couple them and not to stand between the cars, but at their side, when they came together.

Special Findings: When Controlling. Ordinarily, in determining whether special findings are inconsistent with the general verdict, the findings, verdict and the pleadings are alone to be considered; but it is proper, in that connection, to consider the admissions of the parties, whether made by the pleadings or by other means; and the theory of the successful party, as disclosed by his evidence, may be used in aid of construing his pleadings.

Appeal from Shelby District Court.—HON. WALTER I. SMITH, Judge.

THURSDAY, FEBRUARY 8, 1894.

ACTION to recover damages alleged to have been caused to the estate of plaintiff's intestate by negli-

90	462
92	211
90	462
100	490
90	462
914	93

gence on the part of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.—*Reversed*.

T. S. Wright, H. W. Byers, and Wright & Baldwin for appellant.

Turner, Smith & Cullison for appellee.

ROBINSON, J.—On the fifth day of September, 1889, Edward A. Bennett was in the employment of defendant as brakeman on one of its freight trains. While engaged in the duties of his employment he assisted in placing in the front end of his train at Anita two cars owned by a man named Sutton, and known as "Dick Sutton's Uncle Tom's Cabin Cars." One was designed for the use of passengers, and the other for baggage and animals. The cars were coupled together, and were furnished with the Miller hook coupling. The train was run to Atlantic, where the Sutton cars were placed on a side track, for the purpose of changing them to the rear end of the caboose. The train was then moved westward, and was backed in on the side track, to have the Sutton cars coupled to the caboose. That was furnished with a common square-headed drawbar, and the coupling was to be made with a link and pin. Bennett went between the cars to make the coupling, and while there received injuries which caused his death. The plaintiff is executor of his estate, and alleges in the petition that the death of Bennett was caused by the negligence of the defendant as follows: *First*. In using defective, improper, and unsafe appliances to attach the Sutton car to the caboose; *second*, in directing the coupling to be made, and in pushing the cars together with such force as to cause the couplings to pass each other, thus allowing the cars to go together so closely as to crush the decedent between them; *third*, in ordering or permitting

its employees to haul the Sutton cars in the freight train; *fourth*, in not giving the proper signals to decedent, in not obeying his signals, in not furnishing him with proper appliances for making the coupling, and in not having each of the cars provided with bumpers so arranged as to protect the decedent when engaged in making the coupling. The jury returned seventeen special findings and a general verdict for the plaintiff for the sum of two thousand, five hundred dollars. The defendant filed a motion for judgment in its favor on the special findings notwithstanding the general verdict; and on the same day, and subject to that motion, it filed a motion in arrest of judgment, and for a new trial. The latter was afterward withdrawn, and the motion for judgment was submitted, and overruled. Judgment was then rendered in favor of the plaintiff for the amount of the verdict and costs, to all of which the defendant excepted.

I. The defendant insists that the special findings are inconsistent with the general verdict, and, if that is true, the motion for judgment in its favor should have been sustained. Code, section 2809. The special findings show the following facts: Just before the decedent attempted to make the coupling he gave a signal to stop the train. The signal was repeated to the engineer, and he obeyed it. After that decedent gave a signal to back slowly, which was repeated to the engineer, and obeyed. No signal to stop was afterward given by the decedent. While he was in the service of the defendant, the ordinary and usual method of coupling a car provided with a Miller hook to a car provided with a common drawhead was first to insert the link and pin in the Miller hook, and then to set the pin in the common drawhead. When he entered the service of defendant, or soon after that time, he was instructed by his conductor as to the usual and ordinary way of making such a coupling, and was told that when making it

he should not stand between the cars, but at the side, when the cars were coming together. He had made couplings of that kind. He knew that in doing its ordinary business the defendants would receive, handle, and draw over its railway, in its freight trains, cars provided with Miller hooks. When his train was being placed on the side track at Atlantic for the purpose of having the coupling in question made, he was told by his fellow brakeman that the coupling would be to or with a Miller hook, and was cautioned to be careful while making it. It is claimed by appellant, and denied by appellee, that these findings cover all the material issues in the case. It was said in *Conners v. Railway Co.*, 71 Iowa, 492, 32 N. W. Rep. 465, that "to entitle a party to a judgment on special findings against a general verdict in favor of his adversary, the special findings must be inconsistent with the general verdict, and must of themselves, or when taken in connection with the facts admitted by the pleadings, be sufficient to establish or defeat the right of recovery." In this case the petition alleges that the appliances and apparatus used by the defendant in attaching the Sutton cars to its freight train were defective, improper, and unsafe to be used in such business, and that defendant was negligent in ordering the coupling to be made. It also alleges that defendant was negligent in pushing the cars together with such force as to cause the couplings to pass each other, thus allowing the cars to come together and crush decedent. The special findings do not show that the defendant was not negligent in those particulars, nor do they, considered alone, show that the decedent did not follow the instructions given him in attempting to make the coupling. But the petition shows that he was standing between the cars when injured, and one of the special findings shows that he was instructed that in making such a coupling "he should stand from between and at the side of the cars

when they were coming together, and make the coupling, and not stand between the cars when they were coming together." It is clear that, if he had obeyed that instruction, he would have escaped injury. It is said, the special findings do not show that there was no other usual and ordinary way to make such a coupling than that described, nor that the way in which the decedent attempted to make it was unusual and extra-hazardous. It is not alleged in the petition that the couplers were not proper for the cars to which they were respectively attached. The averment that the appliances used for coupling the two cars together were defective, improper, and unsafe must be construed with other allegations of the petition; and, when that is done, it is apparent that the theory of the case on the part of plaintiff, and on which it was tried, is that the Miller hook was of the kind ordinarily used on passenger cars, and that it was so constructed that it did not fit the ordinary freight car coupling of the caboose; that, in consequence of the misfit, the couplings passed each other, and that there were no bumpers or other devices to prevent the cars from coming so close together as to crush the decedent. Ordinarily, in determining whether the special findings in a case are inconsistent with the general verdict, resort can only be had to the findings and verdict and to the pleadings, but it is proper in that connection to consider admissions of the parties, whether made in the pleadings or by other means. When the theory of the plaintiff as disclosed by his evidence is considered, it is clear that the construction we have placed upon the petition is correct. The decedent knew that he would be required to make couplings like that in question, and had made them. He had been instructed not to make such a coupling in the manner he attempted it, and was warned just before the attempt was made, to be careful. When the facts disclosed by the special findings and the pleadings are

considered, the conclusion can not be avoided that the negligence of decedent contributed to cause his death. We are of the opinion that the motion for judgment on the special findings should have been sustained. The judgment rendered is therefore REVERSED.

CITIZENS' SAVINGS BANK OF ST. LOUIS, Appellant, v.
JOHN T. STEWART.

Lost Petition Affecting Real Estate: PRESUMPTION AS TO. It is presumed that a petition affecting realty, under Code, 2628, which makes its filing notice, describes land included in a subsequent decree in the cause, and where that decree is in aid of an attachment of the land, the presumption can not be overcome by testimony giving a mere deductive impression that the petition did not describe the land covered by the decree.

DESCRIPTION IN DECREE: SUFFICIENCY OF. A decree describing a fractional part of a section as "N², S. E⁴, S. E⁴, 36," etc., is sufficient.

Laches in Asserting Title. A delay of six years is no bar to an action to quiet title against a cotenant where each has paid taxes part of the time, the land was open to the public most of the time, and where the defendant, while controlling the land in the absence of plaintiff, has been fully compensated for improvements by use of the land and has failed to make such adverse claim as would set the statute of limitations to running.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

THURSDAY, FEBRUARY 8, 1894.

ACTION to quiet the title to an undivided one half of twenty acres of land in Pottawattamie county, it being the north half of the southeast quarter of the southeast quarter of section 36, in township 75, range 44. In 1871 the land was owned jointly by the defendant and one Thomas A. Walker, each an undivided one half. In March, 1872, Walker conveyed his interest in the land to his wife, Mary C. Walker, with other lands. Walker was insolvent, and several suits, aided

by attachment, were instituted, and the lands, including the tract in question, were levied upon. Among the suits thus instituted was one of Wilkinson against Walker. Wilkinson, as well as others who had instituted attachment suits, commenced proceedings in equity against Walker and wife to set aside the conveyance to her as fraudulent. In the Wilkinson suit, in equity, a decree was entered in December, 1880, canceling the conveyance of Walker to his wife. In the Wilkinson attachment suit, in December, 1881, the land was sold, and bid in by the plaintiff, Wilkinson. The certificate of sale was transferred to the plaintiff bank, and in December, 1882, it received a sheriff's deed. Of the attachment suits against Walker one was by Phelan, in which judgment was obtained for about eighteen thousand dollars. In an equity suit of Phelan against Walker and wife the conveyance to her was set aside. The Phelan judgment was assigned to the plaintiff, who extended an additional credit on the purchase of the land in question of some one hundred and seventy dollars, and other credits as to other tracts included in the purchase under the Wilkinson sale, amounting in all to some six thousand dollars. The law and equity actions of Wilkinson against Walker and wife, referred to, were commenced March 21, 1879. On the first day of August, 1879, defendant Stewart commenced an action for the partition of the land in question—the twenty acres—he being the owner of the undivided one half, making Walker and wife and one Elwell, who was the first attaching creditor of Walker, defendants. Such proceedings were had in the partition suit that the land in question was sold by a referee, and bid in by Stewart, and a deed issued therefor, which was approved by the court. In January, 1885, Stewart commenced a suit in the superior court of Council Bluffs to quiet the title to said land, in which suit the plaintiff bank was defendant, and also certain

of the attaching creditors of Walker, and decree was entered in his favor March 3, 1885, and a transcript of the decree was filed in the office of the clerk of the district court February 8, 1888. The decree in the superior court was obtained upon service of notice by publication only, and it was, on the tenth day of July, 1889, by a suit of this plaintiff against Stewart, set aside as having been obtained by fraud and collusion, and without jurisdiction. This suit was commenced November 16, 1888, and the defendant, in addition to the facts above stated, pleaded that plaintiff herein is barred of his right of action because of laches, and that at the time his partition suit was pending the petition in the equity suit of Wilkinson against Walker contained no description of the land in question, and that it was not involved in nor affected by said suit, and he claims his title to be valid under his purchase at the sale in the partition suit. The pleadings put in issue the material facts, and on the trial in the district court a decree was entered for the defendant, and the plaintiff appealed.—*Reversed*.

Flickinger Bros. for appellant.

Burke & Casady for appellee.

GRANGER, C. J.—It will be well to first settle disputed questions as to the equity suit of Wilkinson against Walker and wife. That suit was pending when the partition suit of Stewart against Walker and wife and Elwell was commenced. Neither the plaintiff bank nor Wilkinson was a party to the partition suit. Appellee's claim is that the land in question was not so involved in the equity suit of Wilkinson against Walker and wife that he was required to take notice of it in the partition proceeding, wherein he purchased the interest of Mary C. Walker, and thus became the owner of the entire twenty acres. Some question is made of the

land being described in the decree in the Wilkinson case, but we think the fact that it is so described is not open to serious dispute. It is true that the description is not written out in full by making each word complete, but it appears there by the use of initial letters and figures as follows: "N^o SE^o SE^o 36," etc. This description, in view of the entire record, leaves no doubt whatever of the identity of the land intended to be embraced in the decree. A question of more serious contention is this: That the land in question was not described in the petition in the equity case, and, as the partition suit was commenced and concluded before the decree was entered in the Wilkinson equity case, the proceedings did not impart constructive notice under the provisions of Code, section 2628, by which parties are required to take notice of suits pending wherein "a petition has been filed affecting real estate." The petition in the equity suit is lost, and appellee seeks, by oral evidence, to overcome the presumptions arising from the decree as to its contents.

It will be understood that the law action of Wilkinson against Walker, in which this land was levied upon by the attachment, and the equity suit to set aside the conveyance, were commenced at the same time, and the latter was in aid of, and made special reference to, the former. The decree in the equity suit refers in terms to the judgment in the law action, and to the deeds of conveyance, which embrace the land in question, and the decree speaks of the conveyances mentioned and set out in the petition herein. We are not to lose sight of the fact that this is not an attempt to attack the decree in the equity case in this collateral proceeding, but merely an attempt to defeat, or show facts to avoid, the operations of that suit as one pending with reference to the land, so as to impart notice before a decree is entered. In this respect the question may form an exception to the general rule as to attacking judgment in collateral

proceedings. It may be said to be an inquiry into the condition of the record of a case during its pendency with a view to determine what notice it would legally impart. The question in this form has not been discussed, and we will not determine it, but look to the effect of the evidence relied upon to overcome the recitals in the decree as to the record on which it is based. The main reliance of appellee is the testimony of three witnesses, Hart, Dailey and Brewer, who were attorneys in the Wilkinson case. The testimony is very weak, and inconclusive. Mr. Brewer says: "I am not positive whether the twenty-acre tract referred to was described in the petition in equity or the amendment in the Wilkinson suit against Thos. A. and Mary C. Walker, but, from the facts and circumstances which I am now able to recall, it is my conviction that it could not have been so embraced or described." The foregoing fairly indicates the tenor and character of his testimony. He has no recollection whatever on the subject, but from "certain facts and circumstances" he deduces a conclusion as to the contents of the petition. To the question, "What is your best impression or recollection as to whether it was involved in said suit in equity?" he answered, "As already stated, it is my impression that the tract in question was not involved in the Wilkinson equity suit." He then states some facts in regard to the other suits, from which he derives the "impression." Mr. Dailey says: "My recollection and judgment is that it was not included in either the bill or the amendment." His testimony then shows that he has no independent recollection on the subject. Mr. Hart says: "I am positive that the twenty-acre tract lying south of the park was not involved in the equity suit referred to in the interrogatory." He then says: "I am sure neither Mrs. Walker nor myself understood that this land was involved in that suit, for the reason that Mr. and Mrs. Walker were warm and

intimate friends, and neither would seek to obtain an advantage over the other. The partition suit was necessary, in order to pass the title to Mrs. Walker free from any cloud which then or thereafter might be asserted by the creditors of Mr. Walker." His further testimony shows that he is without any recollection upon the subject, but that because of certain facts of which he has a recollection he concludes that the petition did not contain a description of the land. Such evidence is practically valueless, if not absolutely incompetent, to overcome the legitimate presumptions arising from the recitals in a decree. Again, it may be said that the impressions of the witnesses are against the probabilities of the case as indicated by the facts that the equity suit was instituted to subject the lands attached in the law action of Wilkinson against Walker, and that the land in question was a part of that attached. Our conclusion is that the land in question was described in the petition in the equity case, and that it imparted notice to Stewart during his prosecution of the partition suit.

As the decree in the equity suit entirely divested Mrs. Walker of title to the land as against Wilkinson, whose interest the plaintiff now holds, and as neither the partition suit nor the sale thereunder could in any way operate to impair the rights of the plaintiff under the decree in the equity suit, the plaintiff is, by virtue of its deed under the sale in the attachment proceeding, the owner of the legal title, and entitled to have the same quieted, unless the claim as to laches or an equitable estoppel shall prevail. This claim is without merit. Stewart and the plaintiff have been tenants in common of this land since plaintiff acquired its title in 1882. Each has paid taxes on the land for a part of the time. The land, most of the time, has been open to the public. Stewart, as a joint tenant, has exercised control over the land in the absence of his cotenant,

but his claim has not been adverse in any sense that would set in operation the statute of limitations. He has incurred some expense in the way of improvements, but he has been more than compensated by what he has taken from the land. To us there seem to be no equities in the case favorable to Stewart. His entire claim rests on a fraudulent conveyance of Walker to his wife, which was adjudged to be void, and the course of procedure by which he has sought to establish his title to the undivided one half of the land in dispute impresses us with a belief that he has intended to secure a title at the expense of injustice to *bona fide* creditors or their assignees. There should be a decree quieting the title to the land in plaintiff, as prayed, and the cause will be remanded to the district court for that purpose. REVERSED.

90 473
119 101

HENRY B. ALLEN AND P. J. SIEBERLING, Appellants, v.
THE WISCONSIN, IOWA & NEBRASKA RAILWAY COM-
PANY; THE CHICAGO, ST. PAUL & KANSAS CITY
RAILWAY COMPANY, A. B. STICKNEY, GEORGE GLICK,
J. M. PARKER, A. T. BURCHARD, J. M. BURCH AND
M. C. WOODRUFF, Defendants and Appellees, v. R.
T. WILSON AND R. T. WILSON & COMPANY *et al.*,
Defendants.

Limitation of Actions: Declaring Fraudulent Issue of Stock Void. Certain taxpayers in B. county became entitled to stock in a railroad under Acts of the Twentieth General Assembly, chapter 159. They claim that defendants entered into a conspiracy to render said stock valueless by fraudulently issuing other stocks and bonds which latter were secured by a mortgage recorded in said county. *Held*, that the recording was a discovery of the alleged fraud within Code, 2529, subdivision 4, or, at least, put upon inquiry concerning it, and that an action brought seven years thereafter was barred. *Wicke v. The Insurance Co.*, 57 N. W. Rep. 632, *distinguished*.

Appeal from Blackhawk District Court.—HON. J. D. LENEHAN, Judge.

THURSDAY FEBRUARY 8, 1894.

PROCEEDING in equity to establish plaintiffs' right to certain assets converted by defendants, and for the cancellation of certain stock and bonds, and for damages, and other equitable relief. Decree below for defendants, and dismissing plaintiffs' bill at their costs, from which this appeal is prosecuted.—*Affirmed.*

C. C. & C. L. Nourse and *W. M. Jones* for appellants.

N. M. Hubbard and *O. C. Miller* for appellees.

KINNE, J.—I. The pleadings in this case are voluminous. We shall endeavor to state, as concisely as possible, the substance of the matters in controversy, in so far as the same are material to a proper understanding and determination of the case. The plaintiffs are taxpayers and the holders of forty-five thousand dollars of certificates issued by the treasurer of Blackhawk county, Iowa, in pursuance of the provisions of chapter 159 of the Acts of the Twentieth General Assembly of this state, on account of taxes voted and paid to aid in the construction of the Wisconsin, Iowa & Nebraska Railroad in Blackhawk county. In March, 1881, several citizens of the cities of Marshalltown, Waterloo, and Des Moines held a meeting at the last named place, and effected an organization for the purpose of building a railroad which should pass through the three cities named, and from a point at or near McGregor, Iowa, southwesterly across the state, to some point on the Missouri river, in Fremont county. Glick and Parker, two of the answering defendants herein, were at that time elected president and secretary, respectively, of said com-

pany, and served in that capacity until about September, 1884. This company was known as the Wisconsin, Iowa & Nebraska Railway Company. Its articles of incorporation were not filed with the secretary of state until March, 1882. Efforts had been made, as far back as 1870, to build a road on substantially the same route as that afterward used by this company, but they were unsuccessful. A few shares of stock were subscribed by the promoters of this enterprise at the time of their organization in 1882, and thereafter some twenty-five shares of stock were subscribed and paid for by parties residing along the proposed line of road. It does not appear, however, that this stock was ever voted at the stockholder's meetings. It was not expected that the company thus organized would itself build the road, but the organization was effected for the purpose of securing capital with which the road might be constructed. After the completion of the organization, the officers of the company made diligent efforts to induce capitalists to interest themselves in the enterprise. The directors of the corporation voted and issued to themselves, for services, one thousand dollars each in stock, except that one thousand, five hundred dollars was voted to and received by Parker. In 1882 the company entered into a contract with Griswold, Harper & Field to build the entire road. Soon after, it became apparent that these men could not raise the money to carry out their contract. In July, 1882, Parker went to New York, and, the above named parties, and others, having formed the Iowa Improvement Company under the laws of New Jersey, with a capital of twenty thousand dollars, Griswold, Harper & Field canceled their contract, and a new contract was entered into between the railway company and the improvement company for the construction of the road. By this contract the improvement company undertook to build and equip the railroad, and to furnish the right of way for the

three hundred and twenty-five miles, in consideration of the receipt by them of sixty thousand dollars per miles, as follows: First mortgage bonds, twenty thousand dollars; second mortgage bonds, twenty thousand dollars; and stock of the railway company, twenty thousand dollars; and, in addition thereto, all subscriptions, donations, local aid, and other sums they might obtain from individuals, counties, towns, cities, or other corporations along the line. Under this contract, work was prosecuted on the line, and a large part of the right of way secured between Cedar Falls, and Waterloo and Des Moines, and considerable money expended in the construction of the road. Afterward this contract was so changed as to provide for the issuing of twenty-four thousand dollars per mile of first mortgage bonds drawing five per cent. interest, instead of twenty thousand dollars drawing six per cent. interest. It seems that directors Glick and Parker, who had spent much time and money in furthering the interests of the enterprise, were, by agreement of the improvement company, to receive one hundred thousand dollars each of the stock which was contracted to be delivered to said improvement company. This stock was, in fact, issued to them, but, at the instance of Wilson, was afterward returned. In September, 1882, Griswold borrowed of R. T. Wilson & Company, of New York, thirty-four thousand dollars, with which to pay an estimate on the Wisconsin, Iowa & Nebraska Railway Company construction, and pledged stock of the improvement company to secure the loan. In October, 1882, Griswold and the improvement company being unable to repay the loan, a modification of the previous contract with the railroad company was made, whereby it was incumbent upon the improvement company to build only that part of the road between Waterloo and Marshalltown, and the construction of other parts of the road remained optional with them. Wilson & Com-

pany were at this time appointed financial agents of both the railroad and improvement companies, with power to sell all bonds, mortgages, and other securities called for by the agreement.

During the same month, it appearing that the bonds could not be sold, and that Wilson & Company would be compelled to furnish the money to build the road, if it was to be built, a contract was made between Wilson & Company and the improvement company which, in effect, substituted Wilson & Company in the construction of the road in the place of the improvement company, and it was then further provided that the improvement company should pay Wilson & Company, for their services in building the road, one thousand dollars per mile, which was to be paid out of the first subsidies received by the improvement company, and, if they were not sufficient, then from its other means. Under this agreement Wilson & Company furnished the money and completed the road from Cedar Falls and Waterloo through Marshalltown to Des Moines in December, 1884, in all about one hundred and fifteen miles of road. Wilson & Company in the name of the Iowa Improvement Company, operated the road from the time of its completion until its sale to the Chicago, St. Paul & Kansas City Railway Company, in June, 1886. January 1, 1883, the Wisconsin, Iowa & Nebraska Railway Company executed a mortgage upon the road for two million, seven hundred and fifty-two thousand dollars, being an amount in excess of twenty-four thousand dollars per mile of said road, and on January 2, 1883, they executed a second mortgage thereon for two million, three hundred thousand dollars, being an incumbrance of twenty thousand dollars per mile, and said mortgages were filed for record January 2, 1883, in Blackhawk county, Iowa. In addition to this, the railway company issued to Wilson & Company stock to the amount of twenty thousand

dollars per mile. November 12, 1883, and June 2, 1884, respectively, the taxes in question were voted in Cedar Falls and Waterloo townships, Blackhawk county, and matured in installments in March and September, 1885 and 1886, and were received by the railway company, and by them paid to Wilson & Company. May 26, 1886, the defendant the Chicago, St. Paul & Kansas City Railway Company was organized. June 3, 1886, a contract was entered into between Wilson & Company and this railway company, whereby the former sold the road, with all the bonds and stock held by Wilson & Company, for the consideration of two million, three hundred thousand dollars first mortgage bonds of the Chicago, St. Paul & Kansas City Railway Company, and the further sum of two million, seven hundred and fifty-two thousand dollars of the stock of the latter company. Proper conveyances were made in consummation of this sale. It is claimed that the road, prior to this sale, had earned more than expenses and taxes, but from all of the evidence it appears that the road had never earned enough to pay its operating expenses, taxes, and the interest on its first mortgage bonds. It is charged that Wilson & Company and Stickney and others, for the purpose of cheating and defrauding those who might be entitled to stock, issued to various persons large amounts of stock of the Chicago, St. Paul & Kansas City Railway Company, without consideration, and fraudulently issued to themselves such stock as paid up stock, without any consideration, and that same was put upon the market, and has passed into the hands of third persons, and that by reason thereof the stock of said company is worthless; that under its articles of incorporation the Chicago, St. Paul & Kansas City railway company has purchased other railroads, thereby increasing its indebtedness, so that it has not been able to meet the accruing interest on its debt, and by reason thereof its stock has no market value. The

relief prayed for is that the issue of two million dollars of stock of the Wisconsin, Iowa & Nebraska Railway Company to Wilson & Company, and the issue of stock, without consideration, of the Chicago, St. Paul & Kansas City Railway Company, be decreed fraudulent and void, and any stock issued in lieu of said two million dollars of stock be declared plaintiff's property; and that, as against the defendants having notice of the frauds charged, all bonds of both railway companies be declared void, and all bonds issued in lieu of other bonds by the Chicago, St. Paul & Kansas City Railway Company in defendants' hands be declared assets of plaintiffs, and that plaintiffs have judgment for damages. The answer denies all allegations of fraud, and and pleads: *First*, that the taxpayers of Waterloo and Cedar Falls townships have waived any right of action they may have had, because the work of construction proceeded upon the faith of and relying upon said taxes, and no suit was begun until after the road was completed, and for the further reason that the taxpayers had full knowledge of the issuing of the bonds prior to the payment of any of the taxes; *second*, that the cause of action, if any ever existed, is barred by the statute of limitations. Before plaintiffs filed their amended petition, the answering defendants filed a written tender and offer to cause to be issued by the proper officers of either railway company the capital stock of either to the plaintiffs for the full amount of the tax certificates for local aid taxes claimed in the petition. This proposition still stands in the case. The court below, at the conclusion of the trial, entered a decree dismissing plaintiffs' bill at their costs.

II. The *gravamen* of plaintiffs' bill is fraud, alleged to have been practiced by the officers and stockholders of the defendant railway companies and others, whereby the stock to which plaintiffs and their assignors would be entitled was rendered valueless. The defense is that

there was no fraud, and, if there was, plaintiffs and their assignors were not damaged; that plaintiffs and their assignors have waived any fraud or illegality, and that this action is barred. We shall not enter into an extended discussion of the testimony touching this question of fraud. We may, however, profitably refer to some of the facts most relied upon by plaintiffs as sustaining the allegations of their bill. It must be conceded that the primary, and, we think, sole, object of the defendants who were promoters of the Wisconsin, Iowa & Nebraska Railway was to secure for the cities in which they lived the benefits that might be expected to flow from another, and presumably competing, line of railway. If it be admitted that in their zeal to accomplish that object they did not act wisely in entering into the contracts and arrangements hereafter referred to, still there is no sufficient evidence showing that their acts in entering into contracts for the construction of the road were the result of bad faith or fraudulent intent. Indeed, when these contracts were made, and the bonds and stock complained of issued, by the Wisconsin, Iowa & Nebraska Railway Company, it does not appear that its officers and directors fraudulently intended to divert any tax that might be voted in aid of the construction of the road to an improper purpose, and thereby to defraud subsequent taxpayers. As is well said by the learned trial judge: "The evidence fails to show any tangible connection between the contract alleged to be fraudulent and the purpose thereby to defraud taxpayers who had not then voted to aid in the building of the railway, and when it could not have been known that they would do so." These acts in issuing the bonds and stock complained of were only resorted to when, after several trials, it had become apparent that without a resort to such measures the road could not be built. The railway company was without money. It was, if its enterprise was to succeed, at the mercy of capitalists. Its officers

were in no position to dictate terms to those from whom they sought and must have aid. It appears that the contract they entered into for the construction of the road was not made with any fraudulent intent, or with any such purpose in view, but as a necessity growing out of their pecuniary condition, and with a view of bringing the enterprise to a successful completion. Now, it is insisted that the issuing of twenty thousand dollar stock per mile was a fraud upon the plaintiffs, and that the directors and officers of the railway should be held liable therefor to plaintiffs. Plaintiffs ground their claim upon the decisions of this and other courts which hold that unpaid subscriptions to the capital stock of a corporation are a trust fund, and that it is a fraud for officers of a corporation to issue paid up certificates of stock upon a grossly insufficient consideration, or upon no consideration whatever. *Osgood v. King*, 42 Iowa, 483; *Jackson v. Traer*, 64 Iowa, 479, 20 N. W. Rep. 764; *Oliphant v. Mining Co.*, 63 Iowa, 333, 19 N. W. Rep. 212. As for another cause this case must be affirmed, we are not called upon to determine whether such an issue of stock, which was of no value, would be such a fraud upon plaintiffs as to entitle them to damages. As bearing upon this question, see *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476.

III. The acts claimed to constitute the fraud, mostly relied upon, consist in the issuing of stock and bonds by the officers of the Wisconsin, Iowa & Nebraska Railway Company to the amount of sixty thousand dollars per mile. Now, if it be conceded that these acts were in fact not known to the plaintiffs or their assignors when done, they were, in law, known to them in January, 1883, when the mortgages securing the forty-four thousand dollars of bonds per mile were placed upon the record in Blackhawk county, Iowa. That was more than five years prior to the bringing of this suit. We think this action is barred. The claimed

concealment of the fraud, if any, has not been established. No effort was made by these plaintiffs or their assignors to ascertain by actual examination of the books of the Wisconsin, Iowa & Nebraska Railway Company or otherwise if any fraud had been practiced upon them. The illegal acts complained of in issuing the stock and bonds occurred July 21, 1882, and, under the law, they were made manifest when the mortgages—the very instruments which were a part of the transaction, and which were made in consummation of the claimed fraud—were placed upon record in the county of plaintiffs' residence. The taxes had not then been voted. With full knowledge of the record of these mortgages, of the fraud, if any, the assignors of plaintiffs voted and paid these taxes. They saw the road built; they made no complaint; they took no steps to assert their rights; and under the law as laid down in *Walker v. Birchard*, 82 Iowa, 391, 48 N. W. Rep. 71, they could not avail themselves at this late day of the statute making the directors liable for issuing bonds in excess of the statute limit. We speak of these matters, also, to show that there are no persuasive equities existing in plaintiffs' favor. Furthermore, plaintiff Allen knew of the sale of the Wisconsin, Iowa & Nebraska Railway Company to the Chicago, St. Paul & Kansas City Railway Company, and at that time not all the taxes in controversy had been paid. The certificates sued upon were issued long after this sale, and still later Allen became the purchaser of them at from five to ten cents on the dollar of their face value. As we have said, the action is barred. The suit was commenced in April, 1890. The fraud, if any, was revealed in January, 1883, when the mortgages were recorded. *Laird v. Kilbourne*, 70 Iowa, 86 30 N. W. Rep. 9, and cases cited. See, also, *Gillespie v. Cooper*, 55 N. W. Rep. (Neb.) 302. This case, so far as this record notice is concerned, is clearly distinguish-

able from *Wicke v. Insurance Co.*, 90 Iowa, 4, 57 N. W. Rep. 632 (decided at this term.) In that case defendant acquired no interest in the mortgaged property by purchase or incumbrance, while in the case at bar plaintiffs' assignors, when they paid the taxes, were entitled to become stockholders in the railroad company, and, therefore, part owners of the property. This action is brought under subdivision 4 of section 2529 of the Code, which provides that all actions for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and those founded on unwritten contracts, etc., shall be barred, unless brought within five years after the cause of action accrues. If for fraud or fraudulent concealment, the statute begins to run from the time of the discovery of the fraud, or when, by the use of due diligence, it might have been discovered. It is averred that the fraud was not known to the taxpayers at the time the taxes were voted, and that it remained undiscovered until about the time this suit was commenced. We do not think this allegation is sustained by the evidence. There is nothing to show that the defendants did anything to conceal or cover up the fraud, if any was practiced. There is nothing to show that by the exercise of due diligence plaintiffs and their assignors could not have discovered the alleged fraud within five years of the time of its perpetration. The means of knowledge of the alleged frauds, so far as plaintiffs or their assignors were concerned, were at all times within their reach, if they had sought to avail themselves of them. But, however this may be, it is clear that when the mortgages were filed they had record notice of the alleged frauds, at least sufficient to put them upon inquiry, but they made no attempt whatever to discover their cause of action. In any view, the statute had run long before this action was commenced. The judgment below must be AFFIRMED.

FREDERICK TAEGER, Appellant, v. J. H. RIEPE *et al.*

Public Highway: WHERE LOCATED: EVIDENCE. It being uncertain where the exact situation of an established highway is, a finding that it is the traveled way used and worked as such highway for many years, and with reference to which houses and fences have been built, will not be disturbed, though some facts appear which can not be reconciled with such finding, other facts being equally irreconcilable with any other finding suggested.

Appeal from Des Moines District Court.—HON. J. M. CASEY, Judge.

THURSDAY, FEBRUARY 8, 1894.

THE plaintiff is the owner of sixty-six acres of land in Des Moines county, and one of the defendants is clerk of the township, and the other is supervisor of the road district in which the land is situated. Defendants have heretofore claimed and now claim the right to maintain and improve a public highway across the land of the plaintiff. Plaintiff admits the existence of a public highway across his land, but avers that it is at another place than where defendants seek to maintain one, and he brings this action to enjoin them from thus entering upon his land, or diverting the public road from the place where the highway legally exists. The district court dismissed his petition, and from its judgment he appealed.—*Affirmed.*

Power & Huston and *Theo. Guelich* for appellant.

C. L. Poor for appellees.

GRANGER, C. J.—Along the line across plaintiff's land, where defendants claim a public highway to be, there has been a traveled road for about forty-five

years, or since 1844. From eighty to two hundred and thirty feet from this line, it is claimed by appellant, there was in 1858 a highway legally established across the land now owned by him, and he brings this action, claiming that such established highway is the only legal one across his land, and hence that the defendants should be enjoined as prayed. The line of the highway as claimed by appellant was surveyed by one A. McMichael, and is spoken of in the record as the "McMichael Survey." This McMichael survey, if where appellant claims it to be, was never opened as a highway. For, from ten to fourteen years before the line contended for by appellees was used as a highway, by being fenced, bridged, and worked, it was used as a highway, and it has been so maintained ever since. Houses have been built with reference to the line as traveled. A plank road was constructed along this line and used for seven years, and then sold to the county. At the time the road, as traveled, was used, worked, and fenced, the land was owned by one Parks. Plaintiff purchased the land in March, 1868. In 1877, one Williams, a surveyor, under a commission from the county auditor and an authority from the board of supervisors "to resurvey all defective roads in the county," says he "resurveyed the road," and made a plat and field notes of the survey made by McMichael. He said in his testimony: "It was impossible to take the McMichael plat and field notes upon the ground, and make an accurate survey from what he had originally done. I made a record of the resurvey in 1877. The road was inclosed by fences to the best of my recollection." On cross-examination, he said: "I think the purpose of the resurvey in 1877 was to get the road correctly platted on the map. The resurvey in 1877 corresponded to the traveled road. Don't know whether it corresponded with the McMichael survey." He says his starting point was forty-six links further

east than the starting point of the McMichael survey. He also said: "The defects in the plat and field notes of the McMichael survey were: *First*, no monuments at the angles; and, *second*, no record of the variations by which the survey was run, and there was a mistake of ten degrees in range two." In April, 1877, because of some contention as to a fence in the road, the county surveyor, Waddle, went there to survey the road. He says: "Think I went out at the request of the road supervisor. I did not attempt to make the survey down to the Taeger place, because it was plain from the start that it would be impossible to locate it with the plat. There were no monuments nor variations at the angles; no record of variations. It was not possible to get the same lines as before, however correct the survey may have been itself originally."

Appellant places much reliance on the testimony of one Steyh, a civil engineer and surveyor, who made a recent survey of the road. He said: "The road can be established from the plat and field notes of its establishment in 1858." On cross-examination, he said: "I did not run the McMichael survey; only platted the lines from the record." He then said, on redirect examination: "From the plat and field notes of the McMichael survey, there is no trouble in finding the location of the road. Only, the surveyor does not give the magnetic variations in his field notes. I do not know what variations he used in running his lines. There would be difficulty in taking the plat and field notes of the survey, and finding the road, if the work was not done accurately, unless some other points had been established in locating the road. McMichael referred to no distinct points. I could take the plat and field notes, and locate the road. Could not say that it would be same road that McMichael surveyed, for the reason that the magnetic variations are omitted. I might run four or five variations, while he might have

used eight or eight and one half. It is often the case that there are slight variations in making surveys. I do not mean to say that there is any defect in the McMichael survey." Recross-examination: "I could not find the magnetic variations in the field notes of the McMichael survey. Neither were there any fixed points in that portion of the road which I surveyed. I did not go all through it. There might have been fixed points further on. I find fixed points in the Wilson Williams survey. In the absence of a record of magnetic variations, I could not be positive as to the accuracy of my resurvey." Against a finding either that the McMichael survey, or the road established in pursuance of it, is where the traveled track now is, or some distance west of it, there are some irreconcilable facts; but it is manifest from the testimony of all of these surveyors that from a record standpoint there is great uncertainty where the road was established. It is true that Steyh says that from the plat and notes there is no trouble in locating the road, but other parts of his testimony show that the statement is to be accepted as largely modified. He says that he "did not run the McMichael survey; only platted the lines from the record." We think the witness intended no more than that he thought the road could be found from the plat and notes. The other surveyors agree that, from an examination of the papers, there seemed no trouble; but, when they attempted to trace the line on the ground with the aid of the plat and the notes, it could not be done, because of the absence of monuments, variations, etc. That there is a highway in that locality is not questioned. Where it is, whether where now traveled or somewhere west of that, we must determine. In view of the undisputed facts of the case as to how the road has been treated as located by all persons in interest, and the great doubt as to the original survey, we do not hesitate to say that the road, as traveled, is the

constituted highway. Williams, the only surveyor who made a fair test as to the identity of the traveled with the established road, states that, in his opinion, they are substantially the same. As we have said, there are irreconcilable facts, but no finding can be made that will avoid them. This finding renders it unnecessary to consider the evidence as to the establishment of the highway by prescription or dedication. The judgment is **AFFIRMED**.

N. WHITED *et al.*, Appellant, v. JOHN S. PEARSON *et al.*

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115 489

Property Out of Which Distributive Share is Taken May Include Homestead. Where a widow has not elected to take the homestead or to take under the will, the homestead becomes part of the property out of which she takes her distributive share.

Appeal from Cass District Court.—HON. WALTER I. SMITH, Judge.

THURSDAY, FEBRUARY 8, 1894.

ACTION for the partition of real estate. There was a hearing on the merits, and a decree, from which the plaintiffs and certain defendants appeal.—*Affirmed*.

H. G. Curtis for appellants.

Willard & Willard for appellees.

ROBINSON, J.—In April, 1889, L. Whited died testate. At the time of his death he owned and occupied, as a homestead, lot 11 of block 135 in the city of Atlantic. His wife survived him, and died in September next following his death. The husband left children by a former wife, and one child, Sidney Whited, of whom his widow was the mother, and grandchildren. She left that child, and also children by a former husband. This action is brought for the partition of the

homestead, the plaintiffs being the children of L. Whited (excepting Sidney) and certain grandchildren. The defendants are the children of the widow and include Sidney. The plaintiffs claim that none of the defendants excepting Sidney are entitled to any portion of the lot. The cause was heard on the evidence submitted in the trial of the case of *Whited v. Pearson* (decided at the January term, 1893), 87 Iowa, 513, 58 N. W. Rep. 30, and involves the construction and effect of the will which was considered in that case. The district court adjudged that the widow did not acquire any interest in the property in controversy under the will, but that she was entitled to a distributive share of one third of the lot. It was conceded that a division of the lot could not be made, and the district court ordered that it be sold, and that one third of the proceeds be paid to the children and heirs of the widow, and that the remainder be paid to the other parties to the action. The parties last named are the appellants.

I. In the case of *Whited v. Pearson* we considered and determined several questions involved in this case, and held that the widow did not elect to retain the homestead for life in lieu of her distributive share in the estate, that she had not consented to accept the provisions of the will, and that her estate included one third of the realty of her deceased husband. What we said in that case is applicable in this, and need not be repeated.

II. It is said, however, that this case involves a question not determined in the other, which is stated by the appellant as follows: "To whom does the homestead itself, which was owned by the husband, descend on the death of the wife, who has occupied it as a homestead during her lifetime?" It is contended that the widow continued to occupy the homestead after the death of her husband, and, as her distributive share was not ascertained and set off to her, it will be

conclusively presumed that by so occupying the homestead she elected to retain it for life in lieu of other interest in the real estate. The character and effect of her occupation of the homestead were fully considered in *Whited v. Pearson*, and it was held that she had not elected to retain the homestead for life, and, in effect, that her heirs were entitled to one third of the real estate of which her husband died seized. That includes the homestead, and, as the cases were heard on the same evidence, the decision in that case is controlling in this. The question presented by counsel does not fully present the material facts in this case, and need not be determined as one of general application. The decree of the district court is **AFFIRMED**.

REPORTS
OF
CASES AT LAW AND IN EQUITY,
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT

DES MOINES, MAY TERM, A. D. 1894.

AND IN THE FORTY-EIGHTH YEAR OF THE STATE.

STATE OF IOWA v. J. B. DANIELS, Appellant.

Defective Indictment: False Pretenses. An indictment for obtaining a signature by false pretenses, must aver that it was obtained with intent to defraud, and the objection that there is no such averment may be raised on appeal, for the first time.

Appeal from Harrison District Court.—HON. SCOTT M. LADD, Judge.

TUESDAY, MAY 8, 1894.

INDICTMENT for designedly and by false pretenses securing the signature of another to a written instrument. There was a verdict of guilty and a judgment, from which the defendant appealed.—*Reversed.*

(491)

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106	138
90	491
110	342
90	491
135	41

S. H. Cochran for appellant.

John Y. Stone, Attorney General, and *Thomas A. Cheshire* for the state.

GRANGER, C. J.—The section of the Code under which the indictment is found is 4073, and it provides that “if any person designedly or by false pretenses, * * * and with intent to defraud, * * * obtain the signature of any person to a written instrument, * * * he shall be punished,” etc. The indictment in this case charges the obtaining of the signature of one D. A. Bendon to a promissory note, but it does not charge that the signature was obtained with intent to defraud, and it is urged that the indictment is fatally defective. It is clearly so, and that fact is not questioned in argument, but it is said that no objection of any kind was made to the indictment below, nor was there a motion in arrest of judgment, and that the objection can not be first raised in this court. That rule obtains in civil, but not in criminal, cases. The law requires the supreme court, on appeal in criminal cases, to examine the record and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgments on the record as the law demands. Code, section 4538. In *State v. Potter*, 28 Iowa, 554, the above language is quoted, and it is then said: “We would not, in a criminal case, affirm a judgment when it appears that the defendant is charged with no offense against the laws, though he should in no stage of the proceedings, either in this court or the court below, object on that ground.” By the failure of the indictment to charge that the signature was obtained with intent to defraud, no offense is stated, and there can be no legal conviction under it. The judgment is REVERSED.

STATE OF IOWA V. WILLIAM RUSSELL, Appellant.

91 493
115 119

Accomplice: Corroboration: INSTRUCTIONS. Code, 4559, provides that a corroboration of an accomplice which merely shows the commission of a crime, or, "the circumstances thereof," is insufficient. The court charged that a corroboration was insufficient which showed the commission or, "circumstances thereof," leaving out the "the" in the statute. *Held*, that such instruction did not rule, that if evidence showed but part of the circumstances it was no corroboration, but, if it disclosed all of them, it was. (2)

SAME. That, *inter alia*, the person charged was seen with the accomplice near the scene of a larceny at about its time, and that the two, later, attempted to sell property of the character stolen at less than value, may be a sufficient corroboration of the accomplice. (3)

Evidence. Testimony that a person ordered knives with other things, and received a box containing all ordered except the knives, is admissible on a charge of larceny from a car, in connection with evidence that the box received was in the car alleged to have been stolen from. (1)

Appeal from Wapello District Court.—HON. W. I. BABB, Judge.

TUESDAY, MAY 8, 1894.

THE defendant was jointly indicted with Spencer Gile for the crime of feloniously breaking and entering a certain railroad car, with intent to commit larceny. The defendant Russell was separately arraigned, tried and convicted, and adjudged to be confined in the penitentiary at Fort Madison at hard labor for one year, from which judgment he appeals.—*Affirmed*.

W. A. Work and J. F. Blake for appellant.

John Y. Stone, Attorney General, and Walsh & Lewis for the state.

GIVEN, J.—I. The state called Thomas Healy, who testified that he was engaged in the hardware business

in Ottumwa; that, in June, 1891, he ordered a bill of hardware from a firm in New York, including one dozen pocket knives of a certain make, through a traveling agent of said firm, who wrote the order down. Mr. Healy was permitted to testify, over the defendant's objections, that the order included pocket knives of a kind which he had previously seen; that a knife shown him, marked as an exhibit, was a similiar pattern to the knives he bought. Mr. Healy testified, without objection, that he received an invoice for the goods ordered, including the knives, and that he received a box containing all the articles, except the knives. He also identified five knives shown him as of the same class and pattern as the knives he had ordered. Appellant contends that the testimony of Mr. Healy objected to was improperly admitted, for the reason that it does not tend to show that the pocket knives ordered were in the car. The evidence tends to establish two facts, namely, that, with other articles, Mr. Healy ordered one dozen pocket knives of a particular make, and that he received a box containing the other articles, but not the knives. We think this evidence was clearly admissible and important, when considered in connection with other evidence tending to show that the box received by Mr. Healy was in the car that is alleged to have been entered.

II. Spencer Gile having been examined as a witness on behalf of the state, the court instructed the jury that he "is what is known as an accomplice, according to his own testimony," and further instructed as follows: "Under the laws of this state, a person can not be convicted upon the testimony of an accomplice, unless he be corroborated by such other evidence in the case as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or circumstances thereof." The instruction is

in the exact language of section 4559 of the Code, except that the word "the" is omitted immediately preceding the concluding words "circumstances thereof." The instruction reads, "or circumstances thereof," while the statute is, "or the circumstances thereof." Appellant's contention is that the omission of the word "the" implies that less than all the circumstances would not be sufficient corroboration. We think the sense of the instruction would not have been changed by the use of the word "the," and that it presented to the jury with sufficient clearness the rule of the statute as to corroboration.

III. Appellant's further contention is that there is no evidence tending to connect the defendant with the commission of the offense, except that of the accomplice Gile, and that there is not sufficient corroboration of the accomplice to warrant a conviction. It is unnecessary that we here discuss the evidence. It is sufficient to say that, in our opinion, there was an abundant corroboration of the witness Gile tending to connect the defendant with the commission of the offense. We may mention, among the corroborating circumstances, the fact that appellant and Gile were seen together in the vicinity of the car about the time when the offense was committed, and that they were afterward together, selling knives, such as were purchased by Mr. Healy, at less than their value. It is argued that the instructions tend to confuse the jury as to the law. We find the instructions to contain a full and fair presentation of the law applicable to the case, and quite as favorable to the defendant as he was entitled to have them. Finding no errors in the record, the judgment of the district court is **AFFIRMED**.

STATE OF IOWA v. T. H. RHODES, Appellant.

Intoxicating Liquors: Common Carrier. Where a station agent was informed that a box consigned to W. H. marked, "groceries," but containing liquor would arrive, on the arrival of such a box, he may properly be charged with knowledge that it contained liquor. (1)

Interstate Commerce. Where liquor is transported to a point in this state in violation of McClain's Code, section 2410, Iowa law takes effect as soon as the boundary is crossed. (2)

Conveying From Place to Place, Defined. Taking intoxicating liquor delivered upon the platform into the freight house is a "conveying from place to place," within said section. (3)

Appeal from Washington District Court.—HON. D. RYAN, Judge.

TUESDAY, MAY 8, 1894.

THE defendant was convicted, and fined one hundred dollars, for knowingly, willfully, and unlawfully receiving, for the purpose of delivering to another, certain intoxicating liquors, which were being, as it is alleged, unlawfully conveyed in this state. He appeals. *Affirmed.*

H. M. Eicher and Hedge & Blythe for appellant.

John Y. Stone, Attorney General, *Thos. A. Cheshire*, *C. J. Wilson* and *E. M. Shelton* for the state.

KINNE, J.—I. The defendant was arrested upon an information charging that he was the agent of the Burlington & Western Railway Company at Brighton, Iowa, and that on August 6, 1891, as such agent, he "did knowingly, willfully, and unlawfully receive, for the purpose of delivering to another, certain intoxicating liquor that was being unlawfully transported or

conveyed from Burlington, Iowa, to Brighton, Iowa, viz., one box containing a two-gallon jug, and said jug being full of whisky, alcohol, or other intoxicating liquor; said box being marked 'W. H., Brighton, Iowa,' and not plainly or correctly labeled or marked, showing the quantity and kind of liquor contained therein." The case was first tried before a justice of the peace, and defendant was convicted, and fined one hundred dollars. From this judgment he appealed to the district court, where a jury was waived, and a trial had to the court. He was again found guilty, and adjudged to pay a fine of one hundred dollars, from which judgment this appeal is prosecuted. From the evidence, it appears that on August 4, 1891, the Dallas Transportation Company, a corporation doing business in the state of Illinois, delivered to the Chicago, Burlington & Quincy Railway Company, at Dallas, Illinois, one wooden box, about a cubic foot in size, marked "W. H., Brighton, Iowa;" that the consignor of said box, when it left it with the railway company for transportation, represented to the railway company that it contained groceries. This box was shipped over the Chicago, Burlington & Quincy Railway to Burlington, Iowa, and then transferred to the Burlington & Western Railway for shipment to Brighton, Iowa. The shipment was made the entire distance upon a single waybill. August 5, 1891, said box arrived at Brighton, and was delivered on the depot platform by the trainmen. Immediately thereafter the defendant, in compliance with the directions of his employers, carried said box from the platform into the freight room of the depot building, where, on the same day, it was seized by a constable under a search warrant. At the time of the seizure the freight on the box was due and unpaid. Inclosed in the box was a jug containing whisky, but it was so inclosed as to be hidden from view. At the time it was seized, the box

was being held by the railway company for the payment of charges, and for delivery to the consignee. Neither the defendant, nor the road by whom he was employed, held a permit for the transportation or sale of intoxicating liquors; and neither had a certificate from the county auditor that the consignee was authorized to sell intoxicating liquors in Washington county, Iowa. Previous to the arrival of the box, a mail carrier told defendant he was looking for a box from Dallas City for William Hown, and said it was likely to be marked "W. H.," and would contain alcohol or whisky. He told the mail carrier that he had not received a box of that description. It arrived the next day. He supposed, perhaps, this was the box the mail carrier told him would come.

II. The information in this case is based upon a violation of Code, section 1553, as amended (McClain's Code, section 2410). This section provides that: "If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person, shall transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and

pay costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. Provided, however, that the defendant may show as defense hereunder, by preponderance of evidence, that the character and circumstances of the shipment and its contents were unknown to him." Under this section, in order to sustain the judgment in this case, it must appear that defendant, knowing that the box contained intoxicating liquor, transported or conveyed the same between points, or from one place to another, within this state, without first having been furnished with a certificate from the county auditor. We think defendant's testimony, heretofore referred to, clearly shows that he knew that the box contained intoxicating liquors. It is conceded that neither defendant, his company, nor William Hown, had a right or permit to sell intoxicating liquors, and that neither defendant nor said company had a certificate from the auditor of Washington county, showing that any of the persons named were authorized to keep or sell intoxicating liquors.

But two questions remain to be considered: *First*, did the liquor, when it first entered this state, become subject to the jurisdiction of our laws, or would such

jurisdiction only attach when the shipment had reached its destination, viz., Brighton, Iowa, or when it was delivered to the consignee? And, *second*, was the defendant, in the removal of the liquor from the platform to the freight depot, engaged in transporting or conveying it, within the meaning of the section quoted?

An elaborate argument is made by defendant's counsel to show that the liquor did not become subject to the jurisdiction of our laws until its "arrival in" this state; and it is contended that it did not arrive within the state, within the meaning of the Wilson bill, until the contract of carriage had been completed. The so-called "Wilson Bill" reads as follows: "All fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in 'original packages' or otherwise." We do not deem it necessary to enter into an extended consideration as to what is interstate commerce. We think the language of the Wilson bill, when considered with reference to the evil sought to be remedied, clearly indicates an intention on the part of congress to make such liquors the subject of state legislation and jurisdiction the moment they cross the boundary of Iowa, and enter the state. Under the decision in *Leisy's case*, 135 U. S. 123, 10 Sup. Ct. 681, such liquors in original packages did not become the subject of state jurisdiction until mingled with the common mass of property therein—until sold. In that case the right of congress to permit the state to exercise jurisdiction over such articles prior to their sale therein was fully recog-

nized. It was for the purpose of removing all impediments to local jurisdiction, as to imported liquors, on their arrival within such jurisdiction, that the Wilson bill was passed. *Wilkerson v. Rahrer*, 11 Sup. Ct. 865. By the Wilson bill, these imported liquors, upon arrival within the state, were subjected to the operation of its laws enacted in the exercise of its police powers, as fully as though such liquors had been produced in such state. Now, if, in this case, the liquor had been produced at a point within the state, and consigned, over the Burlington & Western Railway, to Brighton, Iowa, there could be no question that our laws would apply thereto; and it is equally clear that upon crossing the border of this state, and entering it, such imported liquor becomes at once subject to its laws, the same as if produced in the state. *In re Spickler*, 43 Fed. Rep. 653, the circuit court of the United States, in treating of this matter, says: "The Wilson bill, upon its adoption, made subject to state police laws all imported liquors, as soon as they should pass *within the boundary of the state*." In the case of *In re Van Vleit*, *Id.* 761, it is said: "The original package, when it arrives within the state where its transit terminates, is at once reduced to the rank of domestic liquor—enjoys no privileges not enjoyed by domestic liquor." In *State v. Fraser*, 48 N. W. Rep. (N. D.) 343, the court said: "On crossing the *boundary line of a state*, the supreme authority has declared by this enactment that interstate liquor ceases to be an object of federal protection and control, and becomes mingled with the mass of property within the state, and, in common with all such property, is subject to local police regulations. If, as appellant contends, imported liquors consigned to a place within this state could be lawfully transported thereto, it is certain that such liquors would not be subject to the operation of our laws" to the same extent, and in the same manner, as liquors produced in this state. It seems to us that the

view that state jurisdiction attaches when the imported liquor enters the state is not only in accord with a reasonable construction of the Wilson bill, itself, but in furtherance of the purposes sought to be accomplished by the passage of that act, and finds full support in the authorities.

III. Was the defendant, in the removal of the liquor, engaged in transporting or conveying it, within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight room of the depot. He was one of the instruments necessary to complete the act of transportation. If this be so, then, clearly, he is within the terms of the act, as he conveyed the liquor from "one place to another within this state." His guilt is not to be determined by the distance he conveyed the package, but his conveying it any distance was a violation of the law. With the propriety of legislation making such an act a crime, and with the severity of the punishment attached to doing the act, we have nothing to do. The judgment below must be **AFFIRMED**.

LOUISA C. RICHARDS, Executrix, v. H. E. PURDY *et ux*,
Appellant.

Usury: CONTRACT WITH MUTUAL AGENT. Where one who in making a loan which bears legal interest on its face, acts as the agent of both parties, for convenience, takes a commission note to the lender, which note makes the total rate usurious, but the lender neither authorizes nor ratifies the act, the plea of usury can not be maintained.

Appeal from Calhoun District Court.—HON. CHARLES D. GOLDSMITH, Judge.

TUESDAY, MAY 8, 1894.

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ACTION in equity to recover amounts alleged to be due on promissory notes, and for the foreclosure of mortgages given to secure their payment. There was a hearing on the merits, and a decree for the plaintiff. The defendants appeal.—*Modified and affirmed.*

M. R. McCrary and J. B. McCrary for appellants.

J. C. Kerr for appellee.

ROBINSON, J.—On the twenty-fourth day of February, 1886, the defendants, H. E. Purdy and Kitty Purdy, his wife, made to George L. Richards, as payee, their three promissory notes, of which one was for the sum of two hundred dollars, payable in one year, one was for the sum of five hundred dollars, payable in two years, and one for the sum of one thousand dollars, payable in three years. They bore interest at the rate of eight per cent. per annum, and were secured by a mortgage on a quarter section of land, and a mortgage on certain horses and on other personal property. On the eighth day of March, 1887, the defendants made to the same payee their promissory note for four hundred dollars, payable on the eighth day of June, 1887, with interest thereon at the rate of ten per cent. per annum, and, to secure its payment, executed a mortgage on a lot in the town of Rockwell. The payment of interest on the notes for five hundred dollars and one thousand dollars to August 24, 1890, and on the four hundred dollar note to December 8, 1890, is admitted by the plaintiff. The two hundred dollar note has also been paid. This action was brought to recover the amount due on the three notes last described, and for the foreclosure of the mortgages on the land and lots. The defendants admit that they made the notes, but allege that the three notes first given were usurious; that the consideration for them was but one thousand, three hundred dollars in money borrowed of E. A. Richards;

that the notes were owned by him, but, to enable him to take the acknowledgments of the mortgages, the notes were made payable to his brother, George L. Richards; and that the agreed rate of interest was eighteen per cent. per annum. The defendants further claim that the property included in the chattel mortgage has been sold, and that the proceeds thereof have been or should be applied in paying the two notes in suit first given, and that those notes have been fully paid. The defendants allege that they have paid large sums on the note last given, and demand an accounting of the money paid to George L. and E. A. Richards. The district court found that there was due on the notes in suit the sum of two thousand, one hundred and seventy-three dollars and fifty-five cents, and rendered a decree in favor of the plaintiff for that amount, with attorneys' fees and costs, and for the foreclosure of the mortgages.

I. When the notes in controversy were given, George L. Richards was a nonresident of the state, and the business involved in taking them was transacted for him by his brother and agent, E. A. Richards. H. E. Purdy testifies that when the papers given in February, 1886, were drawn, he was told by E. A. Richards that the money to be loaned belonged to him, but that he did not wish his business known in the town, and could not take the acknowledgments of papers executed to himself, and therefore the notes and mortgages were nominally made payable to his brother. The testimony of Purdy in regard to the matter is in some respects improbable, and is contradicted by E. A. Richards. We are satisfied that the money loaned belonged to George L. Richards. The claim of Purdy that he received but one thousand, three hundred dollars for the three notes first given is not sustained by the record. It is quite satisfactorily shown that he received one thousand, five hundred dollars, and that the two hundred dollar note

was given to E. A. Richards as his commission for securing the loan, and made payable to his brother only as a matter of convenience, to have it secured by the mortgages. It is said that the knowledge of the agent is the knowledge of his principal, and that by accepting the notes, the latter ratified the acts of the agent in taking the commission note, and that the transaction was thereby made usurious. It appears, however, that E. A. Richards was also the agent of the borrower, for the purpose of obtaining the loan; and it is not shown that E. A. Richards authorized the charge for commission, or that he knew of it. The notes for five hundred dollars and one thousand dollars were sent to him, but the two hundred dollar note was not. Whether he ever saw the mortgages, does not appear. The burden is on the defendants to show usury; and under the rule announced in *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. Rep. 193, they have failed to do so.

II. It is claimed that due credits for the payments made on the notes have not been given. So far as the claim relates to the notes for five hundred dollars and one thousand dollars, it is not shown to be well founded; and we think the amount allowed on account of them, to wit, one thousand, seven hundred and fifteen dollars and eighty cents, was authorized. In regard to the four hundred dollar note, it is alleged, and the evidence shows, that the rents derived from the lot mortgaged to secure it were paid to E. A. Richards, to be applied in paying the note. He was the agent of his brother to receive payment, and was paid one hundred and twenty-six dollars of the rents, to be so applied; but although his attention, as a witness, was particularly called to that matter, he accounted for only forty dollars and seventy-five cents of the money so received and the excess does not appear to have been considered by the district court. We conclude that the

amount of four hundred and fifty-seven dollars and seventy-six cents allowed on that note is excessive, and that plaintiff was entitled to recover thereon, at the date of the decree, but the sum of three hundred and sixty-seven dollars and fifty-four cents, and that the sum of four dollars and fifty cents should be deducted from the amount allowed as an attorney's fee. One half of the costs of the appeal will be taxed to the appellee. The decree of the district court is MODIFIED AND AFFIRMED.

STATE OF IOWA V. FRANK PIERCE, Appellant.

Homicide: THREATS. Where one kills another who is preventing defendant's employees from using a dumping ground, his threats to kill anyone who should interfere with defendant's men are admissible though they did not refer to deceased by name. (3)

Verdict: Sufficiency of Evidence. Facts considered and held sufficient to sustain verdict for manslaughter. (3)

Grand Jury: Selection: Indictment. The fact that grand jurors are selected from newly created precincts in which no general election was ever held, will not sustain a challenge to the array. (1, 2)

SAME. The apportionment of such jurors to such precinct may be made on the best information obtainable by the auditor, and the fact that such is not absolutely accurate should not quash the indictment, Code, section 236, is directory. (2)

Time for Challenge. A challenge to the panel or to an individual grand juror must be made before the jurors are sworn. Code, section 4266. (1)

Appeal from Warren District Court.—HON. J. H. HENDERSON, Judge.

TUESDAY, MAY 8, 1894.

THE defendant was indicted in the district court of Polk county for the willful, deliberate, and premeditated murder of E. H. Wishard. The venue of the case was changed to the district court of Warren county, where a trial was had which resulted in a ver-

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dict and judgment for manslaughter. The defendant appeals.—*Affirmed.*

A. A. Haskins for appellant.

John Y. Stone, Attorney General, *Thos. A. Cheshire* and *W. A. Spurrier*, for the state.

ROTHROCK, J.—I. There is no controversy as to the fact that E. H. Wishard is dead, and that he was killed by the defendant. The defendant was arrested, and a preliminary hearing was had before a magistrate, and he was held to abide the action of the grand jury at the next term of the district court. When the grand jury was called, the defendant interposed the following challenge to the panel: "Mr. Haskins: The defendant challenges the array of the panel for the reason that section 236 of the Code, provides that a county auditor shall, on the first Monday in September in each year, apportion the number of grand and trial jurors to be selected from each election precinct, as nearly as practicable according to the number of votes polled therein at the last general election, and deliver a statement thereof to the sheriff, for the reason the election precincts at the election prior to the selection of the present grand jury and trial jury were different—not less than two townships in the county entirely abolished in the meantime—and the grand jury now before the court, and now in the box, were selected from the changed precincts, wherein no election had ever been held prior to that election. That is all I care to do." The testimony of the auditor of the county was taken as to the manner in which the names of electors were selected from which to draw the grand and petit jurors for the year 1891. So far as we have been able to discover from the record in this case, no other challenge to the grand jury was interposed by the defendant, or in his behalf, except that above set out. What was done in

the way of objection or challenge to the grand jury is set out in the argument of appellant's counsel, as follows: "The first serious objection of which we complain is as to the legality of the grand jury which found the indictment. When summoned before the grand jury to show cause why they should not return an indictment against him, the defendant challenged the panel of the grand jury because of the fact that the grand jury for the year 1891, for Polk county, had been drawn from election precincts in the city of Des Moines, and in country townships which were not in existence at the annual election in 1889, when the names of the grand jurors for 1891 were returned by the judges of election. The same objection to the grand jury, and to all of the proceedings subsequent to the indictment, were again raised at every stage of the proceedings, to wit, by motion to quash the indictment, by objection to the testimony, by motion at the close of the evidence, the instructions to the trial jury to return the verdict for the defendant, and by the motion in arrest of judgment and for a new trial, all of which objections will be argued at this time." We have set out all that we can find in the record pertaining to the challenging of the grand jury, because an elaborate argument is presented by counsel upon the alleged unconstitutionality of certain acts of the legislature enlarging the corporate limits of the city of Des Moines, and providing for changing the voting precincts therein. It will be observed that there is neither an express nor implied claim in the record that the law under which the voting precincts were changed was unconstitutional, or that the changes in the precincts were not lawfully made. The challenge to the panel was because the jurors were selected from the precincts, as changed, in which no election had been held prior to the time fixed for selecting names of persons to be drawn as jurors for the year in which the indictment was found. The statute

explicitly provides that a person held to answer for an offense can not be allowed to challenge the grand jury, or any individual juror, after they are sworn. Code, section 4266. This court has repeatedly held that a defendant held to answer has an opportunity to challenge the grand jury before it is sworn, and that, if he fail to do so then, he can not afterward make objection. *State v. Ingalls*, 17 Iowa, 8; *State v. Hinkle*, 6 Iowa, 380; *State v. Howard*, 10 Iowa, 101; *State v. Hart*, 29 Iowa, 268; *State v. Gibbs*, 39 Iowa, 318. It is wholly immaterial what questions were presented to the court touching the illegality of the changes in the extent or number of the election precincts. No such question was presented by the record, and it would be manifestly improper to allow the defendant to make such objection now. The law imperatively requires that all objections to the grand jury must be made when it is impaneled and sworn. It would be absurd to hold that a person held to answer could present part of his objections, and withhold others, to be used in motions to quash the indictment and in arrest of judgment.

II. We will now consider the question presented as to the manner in which the names of the persons were selected from which to draw the grand jury. Section 234 of the Code is as follows: "Two jury lists, one consisting of seventy-five persons to serve as grand jurors, and one consisting of one hundred and fifty persons, or, in counties containing more than twenty thousand inhabitants, of two hundred and fifty persons, to serve as trial jurors, and composed of persons competent and liable to serve as jurors, shall annually be made in each county from which to select jurors for the year commencing on the first day of January." Section 236: "On or before the first Monday in September in each year the county auditor shall apportion the number to be selected from each election precinct as nearly as practicable in proportion to the number of

votes polled therein at the last general election and shall deliver a statement thereof to the sheriff." The last general election held previous to September 1, 1890, was the annual election for 1889. The boundaries were changed in 1890, and before the first day of September of that year. The auditor of the county was required to make the apportionment to the precincts as they were on the first day of September. There had been no general election in the precincts, as changed. He made the apportionment from such information and data as was attainable; and the judges of the precincts, as changed at the general election in 1890, certified to the auditor the proper number of names of persons, as shown by the apportionment. Now, it may be conceded that the apportionment was not entirely accurate. But entire accuracy is not required. It is provided that it must be "as nearly as practicable in proportion to the number of votes polled" in each precinct. The change of the boundary lines of precincts rendered an accurate apportionment impracticable, if not impossible. The auditor was required to act, but was not called upon to perform miracles; and, because the above cited provisions of the law, and others, pertaining to procuring jury lists, are not always strictly followed, this court has uniformly held that the law is directory. It was said in the case of *State v. Ansaleme*, 15 Iowa, 44, where the judges of the election failed to make a certificate to the list of persons returned: "Where there has been a substantial compliance with the law, the indictment should not be set aside. To set it aside because of some slight departure from the directory statute, which has to be administered, as a rule, by those but little conversant with legal and technical forms, would be contrary to the spirit and policy of our Criminal Code." See, also, *State v. Knight*, 19 Iowa, 94; *State v. Carney*, 20 Iowa, 82; *State v. Brandt*, 41 Iowa, 593; *State v. Becky*, 79 Iowa, 368, 44 N. W. Rep.

679. Such a construction of these provisions of the law is contemplated by section 4538, which requires this court to "examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands." It is to be understood that no question is presented in this case as to the manner in which the jury was drawn from the lists, as returned. We think the court did not err in overruling the challenge to the grand jury.

III. It is claimed that the verdict was contrary to the evidence for the reason that it appears, without conflict, that the defendant took the life of Wishard in self-defense. For some time prior to the homicide the defendant was engaged in removing the contents of privy vaults, cesspools and other offensive matter. He had men and teams in his employ, who performed the labor, and he superintended the business. The garbage or filth was for a time removed to, and deposited at, the foot of Ninth street, which had not been opened up for public use. There was an inclosure there made by one Becker. The defendant had an arrangement with Becker to enter upon the inclosure, and deposit the filth. There was a disagreement about the matter and Becker refused to allow the defendant to continue the use of the inclosure as a dumping ground. The city had established a crematory to burn up garbage and other refuse matter at a point near where Becker's fence crossed Ninth street. On the day that Wishard was killed, and for some time before that, he was employed by the city to superintend the crematory. He was regularly sworn into the service of the city as a policeman. The defendant went upon the ground, and insisted that his employees, who were there with loaded wagons, should make excavations in the street, and deposit the loads therein. Wishard objected, and a collision ensued between the defendant and Wishard, in which Wishard

received a mortal wound from a revolver in the hands of the defendant. Wishard had a revolver, which was discharged during the affray; and it is claimed for the defendant that Wishard shot first, and that the fatal shot was fired by the defendant to protect his own life. A large number of persons were present, and witnessed the tragedy; and, as is usual in such cases, the witnesses did not describe the affair, in all respects, in the same way. There was evidence which fully authorized a finding by the jury that the defendant went to the fatal spot with the intention of murdering any person who should interfere to prevent him from depositing the filth at some point near Ninth street. He made such threats on the morning of the day of the tragedy. It is true he did not specially name Wishard as one of his probable victims. He included any and all who should oppose him. He armed himself with two revolvers strapped to his person. It is claimed that evidence of these threats was inadmissible, because they were not specially made, as against Wishard. They were competent evidence, because they included Wishard. It is said that certain evidence as to the statements and declarations of the defendant and Wishard were inadmissible, because they were made after the fatal shot was fired. The objection is without merit. They were part of the transaction, and it would have been error to exclude them. Without detailing the facts testified to by the witnesses, and upon a full consideration of all the evidence—for much of which we have been compelled to resort to the reporter's transcript—we do not hesitate to say that the verdict is not only fully warranted by the evidence, but that, if the jury had found the defendant guilty of murder, an appellate court would not be justified in setting it aside.

Other questions discussed do not require special mention. The case was fairly tried, and the judgment is AFFIRMED.

STATE OF IOWA V. JAS. L. WILLIAMS *et al.*, Appellants.

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Liquor Nuisance: Notice to Landlord. That a landlord having the right to terminate a lease if the premises are used unlawfully fails to exercise it for nearly two months after the tenants plead guilty to illegal sales of liquor therein, taken in connection with other facts tending to impart notice, will sustain a decree restraining the landlord from permitting further illegal sales and taxing him with costs and attorney's fees. (1)

SAME. The fact that the county could have prevented the continuance of the nuisance by enforcing the judgment on the plea of guilty, is no defense to the landlord. (1)

Continuing Nuisance. Where the petition charges that a nuisance is being continued, proof of matters subsequent to the verification of the petition are admissible. (2)

Supplemental Plea: Discretion. Where a decree is set aside, purely, because of being erroneously rendered in vacation, and a supplemental answer filed subsequently sets up no defense, striking such from the files, will not be interfered with. (3)

Appeal from Marshall District Court.—HON. J. L. STEVENS, Judge.

WEDNESDAY, MAY 9, 1894.

ACTION in equity for the abatement of a nuisance alleged to have been caused by keeping for sale, and selling, in premises described, intoxicating liquors, in violation of law. There was a hearing on the merits, and a decree from which defendants James L. Williams and H. E. J. Boardman appeal.—*Affirmed.*

H. E. J. Boardman for appellants.

J. L. Carney for the state.

ROBINSON, J.—When the transactions involved in this case occurred, the appellants were the owners of a certain lot, and building thereon, in the city of Mar-

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shalltown. In March, 1891, the appellants leased to Eno Ederhoff two rooms in the ground floor of the building, for the term of one year from the first day of the next May, for the agreed rent of eighteen dollars per month. The lease provided that the premises should be used for the purposes of a restaurant only, and that no violation of the city ordinances or of the statutes in regard to gambling and the suppression of intemperance should be permitted. A failure to perform all the conditions of the lease was made a ground for terminating it by giving three days' notice to quit. The tenant took possession of the premises with his family, which consisted of a wife and several small children. On the fifth day of May he was imprisoned in the county jail, and there remained until the thirty-first day of July. On the seventh day of September, 1891, this action was commenced. The petition alleges that the defendant Mrs. Eno Ederhoff, the appellants, and their agents, have established, and are keeping and maintaining, in the leased premises a nuisance by keeping therein intoxicating liquors, with intent to sell them in violation of law, and by unlawfully selling them therein. On the fourteenth day of September a temporary injunction was allowed, as against Mrs. Ederhoff. On the twenty-seventh day of October the appellants and their agent, C. E. Boardman, filed an answer, in which they denied having in any way established, kept, or abetted any nuisance on the premises, and alleged, upon information, that Mrs. Ederhoff had not been, and was not, keeping liquors for sale, as charged and denied; and denying that she was or had been maintaining a nuisance. On November 6 the cause was heard, as against Mrs. Ederhoff; and a decree was rendered, granting a permanent injunction against her. On the sixteenth day of the same month the trial against the other defendants was commenced, and ended, and the cause was taken under advisement

on the eighteenth. At the January term, 1892, it was continued, on submission, and on the nineteenth day of April a decree was rendered, in vacation, against all of the defendants but the agent. It appears that the decree was rendered at that time in consequence of a mistake of the court in regard to the agreement of parties, on which the cause was submitted. In May the appellants moved that the decree be set aside, and that another be then entered in their behalf. The decree was set aside in August. In September the appellants asked leave to file an amended and supplemental answer, which was filed with their motion for leave. The plaintiff moved to strike the answer thus filed, and on the same day the appellants applied for a continuance on the ground of the absence of a witness. The motion for leave to file the supplemental answer and the application for a continuance were overruled, the answer was stricken from the files, and a decree was rendered for the plaintiff. The court adjudged that Mrs. Ederhoff had kept a nuisance, as charged, and that she had maintained it during the trial, and that the appellants had notice of the unlawful keeping for sale, and selling, of intoxicating liquors by her. They were enjoined from permitting the premises to be used for the unlawful sale of intoxicating liquors, and were required to pay an attorney's fee of twenty-five dollars and costs.

I. The evidence shows clearly that Mrs. Ederhoff sold beer in the premises during the summer of 1891, and until about the time the decree was rendered against her. On the seventh day of September, 1891, the grand jury returned an indictment against Mrs. Ederhoff, which accused her of the crime of nuisance, committed by keeping for sale, and selling, in the premises in controversy, intoxicating liquors, in violation of law. On the indictment were indorsed the names of thirteen witnesses. On the fourteenth day of

September she entered a plea of guilty, and was adjudged to pay a fine of three hundred dollars, an attorney's fee, and costs. The following was part of the judgment entry: "It appearing to the court that the defendant is in an advanced state of pregnancy, it is ordered that, on payment of costs, order of commitment will be stayed, subject to the direction of the county attorney, or order of court." The costs were paid. On the twenty-fourth day of October a considerable quantity of beer, in bottles was found in the premises. On the eleventh day of November the appellants served a notice to terminate the lease. On the third day of December, Mrs. Ederhoff gave birth to a child, and, twelve days later, the premises were vacated by Ederhoff and family.

We think the evidence fails to show that either appellant had any actual knowledge of the illegal business of Mrs. Ederhoff until after the commencement of this action. The beer was not kept and sold by her in an open and public manner, but some care seems to have been taken to prevent what she did from becoming generally known. Many people passed the place frequently without knowing of the illegal business carried on in it. Mr. Williams left the management of the property to H. E. J. Boardman, and he was out of town from July 17 to August 23, and from August 29 to October 24. Their agent, C. E. Boardman, was with a sick relative a part of the summer, but appears to have been attending to his business at the same time. Mrs. Ederhoff first applied for a lease of the premises, but was told that the appellants would prefer to make the lease to her husband. At that time he appears to have been engaged in selling liquors in violation of law. The agent of appellants went to his saloon to find him, and left directions there for him to go to a place designated when the lease was signed. The agent knew that Ederhoff was confined in jail. On the twenty-fourth day of

August the county attorney informed appellant Boardman, by letter, that intoxicating liquors were being sold in the premises in violation of law, and, about the same time, Williams was also notified of the fact. Boardman visited Mrs. Ederhoff, and was assured by her that no intoxicating liquor had been, or would be, sold on the premises; and he inquired of persons in the vicinity, but failed to obtain evidence that the charge made by the county attorney was true. On the twenty-sixth day of August he stated these facts to the county attorney, and asked for evidence. The county attorney declined to furnish it, on the ground that it would be brought before the grand jury, and he had no right to disclose it. Boardman asked a police officer to observe the premises, and notify him if anything of an illegal character was done there. It appears that the officer's official instructions were not to watch for liquor nuisances, but to pay no more attention to anything he might hear in regard to saloons than any other business, and he reported nothing to Boardman. But we are satisfied that, had the appellants acted with reasonable diligence they would have ascertained the character of the business Mrs. Ederhoff was carrying on much sooner than they did. The business in which Ederhoff was engaged when the lease was made was some indication of the business which might be carried on in the leased premises. When he was confined in jail for a violation of the law in regard to the sale of intoxicating liquors, it would have been natural and proper for the appellants to ascertain something of the business which was being carried on in his absence. When they received information from the county attorney of the nature of the business, they should have been alert to ascertain its true nature. It does not appear, however, that they paid any attention to the proceedings by indictment against Mrs. Ederhoff, nor that they tried to ascertain the names of the witnesses against her. On the four-

teenth day of September, when she entered a plea of guilty of the offense charged against her, the appellants had abundant reason for terminating the lease. They complain bitterly of the failure of the county attorney to furnish them with the evidence on which the indictment was found, and to have the judgment fully executed, and allege that if he had done his duty no illegal sales could have been made after the judgment against Mrs. Ederhoff was rendered. It is not shown that the county attorney should have disclosed the names of the witnesses, upon whom he relied to secure the indictment of Mrs. Ederhoff, before they were examined by the grand jury. By making them known, he might have prevented an indictment. It is true, he could have enforced the judgment when it was rendered, and thus, perhaps, have prevented much of the illegal traffic in question, but his failure to do so is not a defense for the appellants. They can not shield themselves from liability by showing their negligence would have been without effect, had he done his duty. Moreover, the enforcement of the judgment involved the probable imprisonment of Mrs. Ederhoff at a time when considerations of the highest character demanded that she be at large. The appellants could have terminated the lease without depriving her of her liberty, but they did nothing for nearly two months after she had caused to be made of record the fact that the conditions of the lease had been violated. The facts satisfy us that the appellants should be charged with knowledge of the true character of the business carried on in the leased premises, and with having been parties to it, within the meaning of the law. Our conclusion has support in the following authorities: *State v. Grim*, 85 Iowa, 451, 52 N. W. Rep. 351; *Littleton v. Harris*, 73 Iowa, 168, 34 N. W. Rep. 800; *Drake v. Kingsbaker*, 72 Iowa, 444, 34 N. W. Rep. 199; *Gray v. Elskamp*, 69 Iowa, 125, 28 N.

W. Rep. 475; *Martin v. Blattner*, 68 Iowa 288, 25 N. W. Rep. 131, 27 N. W. Rep. 244.

II. It appears that the petition in this case was verified on the fifteenth day of August, 1891, although it was not filed until the seventh day of September; and, as no supplemental petition was filed, the appellants insist that evidence of violations of law after the verification of the petition was inadmissible, and can not be considered. It was held in *Allen v. Newberry*, 8 Iowa, 69, that "evidence can not be given of matter arising after the commencement of the action, whether it occurred before or after the plea pleaded, unless the foundation has been laid by proper pleading." See, also, *Sigler v. Gordon*, 68 Iowa, 441, 27 N. W. Rep. 372; Code, section 2731. The petition in this case charges that the defendants "have established, and are now" keeping and maintaining, a nuisance. It charges a continuing, and not a past, offense, and proof of illegal acts committed at any time after the commencement of the act is competent. That offered for plaintiff in this case showed persistent violations of the law from near the beginning of the lease to Ederhoff until about the time of the trial, and is material and proper to sustain the averments of the petition.

III. We do not think the district court abused its discretion, in refusing to permit appellants to file a supplemental pleading. The first decree rendered was set aside, but not for the purpose of granting a new trial, and the matter set out in the supplemental pleading offered would not have constituted a defense. Some of the questions discussed in connection with this branch of the case are disposed of by what we have already said. Others are not of sufficient importance to be set out at length.

IV. The appellee asks the allowance of an attorney fee for services rendered by its attorney in connection with this appeal, and the sum of fifty dollars is allowed

for that purpose. We find no sufficient ground upon which to disturb the decree of the district court, and it is **AFFIRMED**.

STATE OF IOWA V. PATRICK ENRIGHT, Appellant.

Ravishing Imbecile: Indictment. An indictment under Code, 3863, prohibiting carnal knowledge of imbeciles, need not aver that the act was done "with force and against the will." (1)

SAME: EVIDENCE. Where there is a conflict as to the mental condition of the prosecutrix, aged about fourteen, and her demeanor and testimony on the stand are those of one almost imbecile, a verdict of conviction will not be disturbed on appeal. (4)

Election by Prosecutor. The date of the commission of the offense need not be proved as laid, Code, 3863,—and, where the evidence tends to show that the crime was done before the date charged, the state can not be made to proceed as to the acts of one of the dates only. (2)

Appeal from Howard District Court.—HON. W. A. HOYT, Judge.

WEDNESDAY, MAY 9, 1894.

THE defendant was convicted in the court below of an assault with intent to commit a rape, and he appeals.—*Affirmed*.

John McCook and *Springer & Clary* for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire* for the state.

ROTHROCK, J.—I. The charging part of the indictment is in these words: "For that on or about the fourth day of October, A. D. 1891, at and within the county of Howard and state of Iowa, said defendant, Patrick Enright, did willfully, unlawfully, and feloniously ravish and carnally know one Martha Curran, then and there being, the said Martha Curran being then and there a girl of the age of fourteen years, and naturally imbecile and weak in mind, and deficient in

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understanding, to such an extent that she did not know or comprehend the nature of the act, and naturally of such imbecility of mind and weakness of body as to prevent her making effectual resistance to said defendant and his unlawful act." The indictment is founded upon section 3863 of the Code, which is as follows: "If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon conviction, be punished as provided in the section relating to ravishment." It is urged that the indictment is fatally defective because it is an attempt to charge the crime of rape, and does not contain the essential averment that the criminal intercourse was consummated "with force and against the will." It will be observed that the crime charged is set out in the indictment in nearly the exact language of the section of the statute above quoted. That section is supplementary to section 3861, which defines the crime of rape. The punishment is the same, but the crime defined in section 3863 is for the protection of a class of females, who, by reason of mental or bodily infirmity, are incapable of making the resistance required to protect themselves against the force of the ravisher. There is no question in our minds that the indictment is in all respects sufficient.

II. It appears from the evidence that Martha Curran was delivered of a child on the twenty-fourth of April, 1892. According to the usual period of gestation, the child was begotten in the month of July, 1891, when she was but little past fourteen years of age. It is averred in the indictment that the crime charged was committed on or about October 4, 1891,

and there was evidence to the effect that the defendant was at the home of the complaining witness on that day. But it does not appear that he then had sexual intercourse with her. There is no evidence tending to prove that fact. It does appear from the testimony of Martha Curran that the defendant had sexual intercourse with her some time in the summer of 1891. Counsel for the defendant insists that the court erred in refusing to compel the state to elect upon which one of the acts of the defendant a conviction would be claimed. No case was made in the evidence requiring such an election. The only evidence of a criminal act was directed to a period before the month of October, 1891. It is scarcely necessary to repeat here the fundamental rule of law that the date of the commission of a criminal act averred in an indictment need not be proved as laid. The court properly instructed the jury on that question.

III. There was really no question as to the fact of sexual intercourse between the parties. The prosecuting witness so testified, and two other witnesses stated that the defendant admitted to them that such was the fact. To one of them he stated that "he had connection with Martha Curran," and offered to bet a dollar that he had, and to prove it by one Owens. The other witness testified as follows: "I asked him what he was going to do. He said he didn't know; he had one of the Curran girls in a family way. He was under the influence of liquor when he said it. He said he might have to leave. He did not say which of the girls." There is no conflict in the evidence on this fact, and no denial in any way, excepting the plea of not guilty. If the fact of sexual intercourse were the only one involved, there could have been but one result, and that would have been against the defendant.

IV. Other matters are discussed by counsel, which we do not think demand separate consideration.

There is only one real question in the case, and that is whether the jury were warranted in finding from the evidence that the prosecuting witness belonged to the class of females designated in the statutes. The testimony of the witnesses is in hopeless conflict. That of the father and mother of the girl, and one or two neighbors, and that of two physicians who examined her for the purpose of ascertaining her strength of mind, warrant the conclusion that she was by nature afflicted with "such imbecility of mind" as to prevent effectual resistance to an act of the kind charged. On the other hand, quite a large number of witnesses testified to facts, circumstances, and conclusions which show that she was perfectly sane, and fully equal to average children of her age in mental capacity. Taking the testimony of witnesses on both sides of the question, without more, we would be strongly inclined to reverse the case. But the record shows that the complainant was examined as a witness, and that her examination was quite lengthy. Her answers to questions show that she is almost an imbecile, unless she was feigning imbecility. The learned judge and the jury who tried the case saw and heard her while she was on the witness stand, and we can not put ourselves in the place of the judge and jury. Her appearance and demeanor while testifying were most important considerations in determining her mental capacity, and, under the circumstances, we think it is not proper for this court to interfere with the verdict. Another consideration, which, no doubt, had its influence with the court and jury, was that the complainant was a mere child when this calamity came upon her. She was but little past what is known as the "age of consent." If she had been under the age of thirteen years, mere carnal knowledge would have constituted the crime of rape without any evidence of mental weakness or imbecility. The charge of the court to the jury was not open to criticism

or objection. It was in all respects fair to the defendant, and our conclusion is that the judgment should be and is **AFFIRMED**.

JOHN MORRISON V. JOHN ROSS, Appellant.

Appeal: Certificate Made in Vacation. The court can not grant a certificate in a case involving less than one hundred dollars, except at the time of trial, and before the adjournment of the term, though it grant leave during the term to have one applied for and made in vacation.

Appeal from Calhoun District Court.—HON. CHARLES D. GOLDSMITH, Judge.

WEDNESDAY MAY 9, 1894.

THIS action was commenced before a justice of the peace, and taken on appeal, by the defendant, to the district court, where the judgment was affirmed on plaintiff's motion. Defendant's motion to set aside the judgment and affirmance was overruled, from which ruling the defendant appeals upon a certificate of the trial judge.—*Dismissed*.

M. R. McCrary for appellant.

W. E. Gray for appellee.

GIVEN, J.—The record shows that judgment was rendered on appellant's motion on the last day of the term, and that the court "gave leave to defendant to make out the law points he wished to be certified to the supreme court of Iowa, and he would sign certificate and law points in vacation, which was accordingly done." It is evident that the certificate upon which this appeal rests was not given at the time the judgment appealed from was rendered, nor at the term at which it was rendered, but some time during the

vacation that followed. This court has uniformly held that the certificate of the judge must be made at the time of the trial, and before the adjournment of the term. See McClain's Code, section 4402, notes. The reasons for the rule are well stated in *Angus v. Shannon*, 60 Iowa, 311, 74 N. W. Rep. 315. That case does not hold that leave may be given to make and file a certificate after the term, as that question was not involved in the case. Without a certificate made and filed as required by law, this court is without jurisdiction in this case. *White v. Beatty*, 64 Iowa, 331, 20 N. W. Rep. 459; *Beach v. Donovan*, 74 Iowa, 543; 38 N. W. Rep. 404. There being no certificate as required, the appeal must be DISMISSED.

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STATE OF IOWA V. J. K. CUMBERLAND, Appellant.

Murder: Sufficiency of Evidence: Plea of Guilty. Facts before and after the killing considered, and held to warrant conviction of murder in the first degree. (2)

Capital Sentence: Presumption. Code, section 3851, requires that on plea of guilty to an indictment for murder in the first degree, the court shall determine the degree by the examination of witnesses, and award sentence accordingly, but it does not require that the purpose of taking such testimony, or such determination shall be recorded; and where hanging is the punishment for murder in the first degree alone, a sentence of hanging raises a presumption that such degree of the crime was found. *McCauley v. U. S., Morris*, 641, distinguished and criticised. (1)

Appeal from Shelby District Court.—HON. H. E. DEEMER, Judge.

WEDNESDAY, MAY 9, 1894.

THE defendant was indicted for murder, pleaded guilty, and was sentenced to be hanged. He appeals.
—*Affirmed.*

Byers & Lockwood for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the state.

KINNE, J.—I. The record in this case shows that the defendant and his wife, Josie Cumberland, were indicted for murder in the first degree. Defendant filed his written plea of guilty as charged, whereupon, on motion of the state, Josie Cumberland was discharged. Defendant also made a confession in writing, under oath, to the crime. When the day arrived for sentence, testimony was taken touching defendant's guilt, consisting of his confession, and the evidence of several witnesses, whereupon the court sentenced defendant to be hanged.

The defendant first contends that the law requires that, in a case where one pleads guilty to an indictment charging murder in the first degree, the court "proceed by the examination of witnesses, to determine the degree of the crime and award sentence accordingly." Code, section 3851. It is also claimed that such determination must be made a matter of record. Section 3849 of the Code provides what shall be or constitute murder in the first degree, and fixes the punishment "with death or imprisonment for life at hard labor in the state penitentiary, as determined by the jury, or by the court if the defendant pleads guilty." Under these statutes, in a case like that at bar, it is the duty of the court to hear evidence from which it may be able to determine the degree of the defendant's crime. It must also determine of what degree of the crime charged the defendant is guilty. Did the court below comply with the law in these respects? It is true the record fails to show for what purpose the evidence in this case was introduced. As, however, the court could only hear testimony for one purpose—"to deter-

mine the degree of the crime and award sentence accordingly"—the purpose of the examination is as clearly made manifest as it would have been had the reason for taking the testimony been entered of record. Nor does the statute require the fact of taking testimony, and the reason it is taken, to be entered of record. While the proper and better practice is to enter of record the reason why the testimony is taken, and the determination arrived at therefrom by the court, yet such a duty is not enjoined upon the court by the statute, and hence it was not error to fail to do so. What we have said applies with equal force to the claim that the record must show that the court found the grade of the offense to be murder in the first degree. The statute does no more than to enjoin upon the court the duty of ascertaining and determining from the testimony the degree of the offense. The court is not required, after it has made such a determination, to enter the fact of record, although, as we have said, it would be proper to do so. Much reliance is placed by counsel for appellant on *McCauley v. U. S., Morris* (Iowa), 641. In that case the person had been indicted for murder; in what degree, does not appear. The statute reads: "In all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder or manslaughter, and if such prisoner be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly."

It appears that in that case the defendant had pleaded not guilty. The prosecution had closed its case, after which defendant withdrew his plea of not guilty, and pleaded guilty, and was thereupon sentenced to be hung. No witness was examined after the plea of guilty was put in, to ascertain the degree of guilt,

and no record of the court's decision was made. Because of the latter fact, the case was reversed. In the opinion it is said: "It is true, that, from the subsequent action of the court, there is a strong inference to be drawn as to that conclusion, which would have been sufficient to have sustained a judgment in a civil case; but, in a criminal—and especially a capital—case, greater precision is required." The court had no power to enter judgment of hanging, except for the crime of murder in the first degree. When, therefore, it entered its judgment, it, in legal effect, did determine the degree of the crime of which defendant was guilty. In any case other than one involving human life, no court would hesitate for a moment to hold that the judgment involved a determination of defendant's guilt of murder in the first degree,—as much so as if there had been a formal finding of the fact. Now, it is true that under the statute, on a plea of not guilty, and on a jury trial in such a case, the jury must ascertain and fix the degree of the offense. That is to enable the court to know what punishment to impose. But, when the duty of determining the degree of the offense is imposed upon the court, it is only required to hear evidence to enable it to determine the grade of the offense of which defendant is guilty, and award judgment accordingly. We are not inclined to follow the cited case, even if it should be held applicable under our present statute. Under section 4538 of the Code, we are required to disregard technical errors or defects which do not affect the substantial rights of the parties. The alleged error spoken of was of that character.

II. Lastly, it is insisted that the testimony does not show that the defendant was guilty of murder in the first degree. The evidence shows without dispute that defendant killed James and Jasper Robinson with a deadly weapon; that these men were in the barn, some distance from the house; that defendant, armed

with a deadly weapon, left the house, and went to the barn, or toward it, for the purpose of meeting these men; that he then killed them; that he then secreted their bodies in the barn, and later took the bodies away, and buried them, and concealed all knowledge of what he had done. True it is, in his confession, defendant claims the killing was the result of a quarrel, and in self-defense. But we think, in view of all the circumstances disclosed in the evidence, the fact that the defendant claims he killed the men by shots from a revolver; that not only bullet holes were found through their heads, but also the skull of one had been crushed by a blow from some heavy instrument; the fact that defendant secreted the bodies, attempted to destroy all their clothing, falsely stated to parties that they had gone to another county; and many other facts and circumstances,—fully warranted the court in finding that defendant was guilty of murder in the first degree. His acts after killing were not in accord with those of a man who acted in defense of his own person or life.

The importance of this case to the defendant and the state has caused us to give it the most careful consideration. We discover no error, and the judgment below must be **AFFIRMED**.

LINDSAY, SALINGER & COMPANY, Appellants, v. O. W. CARPENTER.

Attorney and Client: Negligence: PLEADINGS. The client may introduce evidence tending to show a want of care, and the extent and character of the services on part of the lawyer, where the value of the latter's services is in issue, though negligence is not pleaded. (1)

SAME: INSTRUCTION. An instruction that, while the practice of the law demands special qualifications, to be attained only by constant research, absolute certainty is not obtainable, and that the profession of a lawyer is useful and reputable so long as he conducts himself with integrity, and that they ought to be protected when they act to the best of their knowledge and skill, is not open to the objection that it submits the question of negligence to the jury. (1)

Scope of Retainer. A conversation had immediately after the trial, in which the client is told why he was defeated, advising appeal and proposing terms for its conduct, is admissible. (2)

Counterclaim Covered. While a counterclaim is not, in strictness, a defense, an agreement to defend for a sum certain includes services on a counterclaim presented in the case. (4)

Testimony: Practice. Where testimony is stricken out and subsequently admitted without objection, there is no prejudice. (3)

SAME. Where one is asked whether he said a certain thing to another, that part of the answer which states that the other said it, is properly stricken out. (3)

Appeal from Carroll District Court.—HON. GEORGE W PAINE, Judge.

THURSDAY, MAY 10, 1894.

PLAINTIFFS state, as their cause of action, that they are practicing attorneys at law, and as such were retained by the defendant to defend an action pending against him; that they rendered services in defending said action, and paid expenses incurred therein, all of the reasonable value of one hundred and thirty-three dollars and fifteen cents; and that only twenty dollars thereof has been paid, wherefore they ask to recover one hundred and thirteen dollars and fifteen cents. Defendant answered, admitting that he employed the plaintiffs, and that they did for him what was done in said case, and alleges that plaintiffs agreed to defend said case for twenty-five dollars, and that he has paid them in full therefor. Defendant asks, by way of counterclaim, to recover nineteen dollars paid to plaintiffs to be used in said defense, which he alleges they converted to their own use; also sums alleged to have been loaned to and paid for plaintiffs, at different times, amounting to twelve dollars. Plaintiffs, in reply, admit the receipt of nineteen dollars, and allege that it was, with defendant's consent, applied as partial payment for their services. They deny that any other payment was made to them. Upon these issues the

case was tried to a jury, and a verdict and judgment given for the defendant. Plaintiffs appeal.—*Affirmed*.

Salinger & Lindsay and *F. M. Powers* for appellants.

M. W. Beach and *J. P. Conner* for appellee.

GIVEN, J.—I. Appellants complain of the admission of certain evidence, and the ninth paragraph of the charge, contending that thereby the question, whether appellants were negligent in performing the services sued for was submitted to the jury, when no such defense was pleaded. It is true that such negligence was not alleged, and that the evidence objected to tends to show a want of care; but the value of the services was in issue, and, as this evidence tended to show the extent and character of the services, there was no error in admitting it. The instruction complained of is as follows: "The practice of the law is not merely an art. It is a science which demands from all who are engaged in it special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But, as the law is not an exact science, there is no attainable degree of skill or excellence, at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. The part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity, and they ought to be protected where they act to the best of their knowledge and skill." Taken in connection with the court's statement of the issues, this instruction could not have been understood as submitting the question of negligence. Its tendency was to remove any prejudice that might exist against attorneys' charges, by giving

reasons that enter into the value of such services. The instruction was certainly favorable to appellants.

II. Appellee was permitted to testify, over appellants' objections, to a conversation with Mr. Salinger, immediately after the conclusion of the trial, as to the reasons why the case was decided against him, and about taking an appeal. Appellants contend that, as this conversation was after the case had been tried and the services fully rendered, it was admissible. It was certainly the duty of appellants, under their retainer, to inform appellee as to what they believed to be the cause of his defeat, and to advise him with respect to an appeal. While their retainer may not have required them to follow the case on appeal, it did require them to inform and advise appellee as to an appeal,—a service that was proper to be considered in fixing the amount to be allowed appellants. What was said as to the terms upon which appellants would prosecute the appeal was admissible, as part of the conversation, and of the advice given.

III. Appellee having testified that, on a certain occasion, appellant Salinger had told him to leave the room, and that the court had been bought, Mr. Salinger was recalled, and asked if he had told Carpenter to leave the room, to which he answered: "I say it is a falsehood. I did not tell him to leave the room, or get ready to leave the room, that day, or anything of the kind. There is no sense in it." This answer was stricken out on appellee's motion. Mr. Salinger was also asked, "State whether or not you ever told him that the court had sold out, or been bought," to which he answered: "I never did, in my life. He is the man that said that, over there, at Burke's." The latter part of this answer was stricken out, on appellee's motion. Appellee's abstract shows that, following the first answer, Mr. Salinger stated, without objection, that he did not advise appellee to

leave the room. There was no prejudice in the first ruling complained of, nor was there any error in the second, for the part of the answer stricken out was not responsive to the question, nor in rebuttal of anything said by appellee.

IV. Appellants complain of the refusal to give certain instructions asked. The first is to the effect that the burden was on appellee to prove the payments alleged, and that there was an agreement for twenty-five dollars, as alleged. In the sixth paragraph the court instructed that the burden was on appellee to establish the allegations of his counterclaim and of payments. It is not said in this paragraph that he had the burden of proving the alleged agreement, but, taking the whole charge together, it leaves no room for doubt on that subject. In the defense made by appellants for appellee, they set up a counterclaim. One instruction refused was to the effect that an agreement to defend the case for twenty-five dollars would not include services in presenting the counterclaim. While it is true that, strictly speaking, a counterclaim is not a defense, it is clear that appellants' retainer was to present on behalf of appellee whatever might prevent a recovery against him. The agreement to defend the case was certainly not understood to be limited to presenting defensive facts, alone, but whatever might be properly presented on behalf of the client. The court instructed, to determine the amount to be allowed to each party, to return a verdict for the difference in favor of the party entitled thereto, or, if the amounts were equal, to return a verdict for the defendant. Appellants complain of this instruction, and discuss the evidence with respect to the payments and counterclaim. Those were questions for the jury, and the instructions were plain and explicit on that branch of the case.

V. Appellants move to tax all the costs of appellee's abstract, except twenty-four lines thereof, to appellee, because it was not filed in time, and is a repetition of appellants' abstract. Appellee shows that the delay was in pursuance of an understanding between counsel. A comparison of the abstracts shows that at least three fourths of appellee's abstract is a repetition of appellants', and to that extent was unnecessary. Therefore the motion is sustained, so far as to tax three fourths of the cost of appellee's abstract to appellee. We find no error prejudicial to appellants, and the judgment of the district court is, therefore, **AFFIRMED**.

STATE OF IOWA V. SILAS EAN, Appellant.

Adultery: Evidence. Defendant, a married man, and another occupied two adjoining rooms with women, and defendant solicited intercourse of the woman not in his room, *held*, that a conviction will not be disturbed. (1)

Accomplice: Corroboration. The other man was not an accomplice, though he, too, may have been guilty of adultery. (1)

Indictment: Needless Averment. Where there is an averment that adultery was committed with a woman to the grand jurors unknown, and that she was over eighteen years old, the last is surplusage and need not be proven. (2)

Misconduct of Prosecuting Attorney. Where guilt is clear, there will be no reversal, though an improper opening statement was made and highly improper questions asked, to which objections were sustained. (3)

Appeal from Winneshiek District Court.—HON. L. O. HATCH, Judge.

THURSDAY, MAY 10, 1894.

THE defendant was indicted for the crime of adultery, convicted, and sentenced to the penitentiary for the term of one year. He appeals.—*Affirmed*.

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108 74

90 534
111 238

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113 364

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115 458

90 534
119 383

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125 145

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133 746

90 534
135 272

E. R. Acers and E. E. Cooley for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire* for the state.

KINNE, J.—I. The indictment charged the defendant with having committed the crime of adultery by having carnal knowledge of a woman whose name was unknown to the grand jury, and who was over eighteen years of age. It contained other necessary averments. It is urged that the evidence does not support the verdict. The record discloses without conflict that defendant was a married man at the time the crime is alleged to have been committed; that his wife was the prosecuting witness before the grand jury and on the trial in the court below. The testimony shows: That two ladies called on the defendant at his hotel on June 26, 1892, in Decorah. That defendant and the ladies took supper together, and all left the hotel. That defendant did not appear there again until the next morning. That defendant and one Oleson met two ladies that evening at the railroad depot. That defendant and his companion thereafter left the women, and went to the hotel for a short time. That defendant and Oleson then went to two rooms in Steger's building. These rooms had no door between them,—simply an opening. That these two women came into these rooms, and that defendant occupied one of the rooms most of the night, and one of the women was in his room, and stayed there six or eight hours. That there was a bed in the room defendant was in. That about four o'clock in the morning defendant went into the room occupied by Oleson and the other woman, and insisted upon her coming to his room, and she refused, and he threatened to have her arrested if she did not accede to his wishes. Defendant then went out of the room, and, after he had gone, the woman who had been with him in his room

made her appearance. Soon after, a policeman arrested the women, and took them to jail. The beds in both rooms had been occupied. Now, it is true that no one saw defendant in the act of having connection with either of these women. The testimony is wholly circumstantial, yet was sufficient to warrant the verdict. It is said that the witness Oleson was an accomplice, and hence must be corroborated before a conviction can be had. But Oleson was not an accomplice. An accomplice is "one who is joined or united with another; one of several concerned in a felony; an associate in a crime; one who co-operates, aids, or assists in committing it." Black, Law Dict., title, "Accomplice." Oleson was in no way aiding or assisting defendant in the commission of the crime of adultery. Oleson may have been guilty of a crime himself, independent of defendant; but, however that may be, Oleson had no part in inducing or assisting defendant in committing the crime of adultery.

II. Error is assigned because the court, in its instructions, did not charge the jury that it was incumbent on the state to prove that the woman with whom the sexual intercourse was had, if any, was over eighteen years of age. It is alleged in the indictment that she was over eighteen years of age. It is conceded that the allegation was unnecessary, but it is claimed that, being averred, it must be proven. It has been held in this state that an unnecessary averment in an indictment may be treated as surplusage if, without it, the allegations are sufficient to charge the offense. *State v. Finan*, 10 Iowa, 19; *State v. Schilling*, 14 Iowa, 455; *State v. Ansaleme*, 15 Iowa, 44; *Town of Eldora v. Burlingame*, 62 Iowa, 32, 17 N. W. Rep. 148; *State v. Ormiston*, 66 Iowa, 143, 23 N. W. Rep. 370; *State v. Goode*, 68 Iowa, 593, 27 N. W. Rep. 772. Nor was it necessary to set out in the indictment the name of the woman with whom defendant had connection. In

charging that the offense was committed with a woman whose name was unknown to the grand jury, the indictment was as complete as though the name had been stated. Nor does it appear that the failure to set out the name worked to the defendant's prejudice. *State v. Goode*, 68 Iowa, 318, 27 N. W. Rep. 772; *State v. Crawford*, 66 Iowa, 593, 23 N. W. Rep. 684. Nor is it shown that the name of the woman could have been obtained at the time the indictment was found.

III. Error is assigned on account of the misconduct of the county attorney. In opening the case the county attorney stated to the jury that he expected to "prove that the defendant was arrested for seduction on the day he was married, and that on that day he took his wife to her father, and bid her good bye, and left her to take care of her babe and herself." He asked the prosecuting witness: "State whether, on or about the fifteenth of March, 1892, and before you were married to him, you had your husband arrested for seducing you." "State whether the defendant left you on the day you married him, and has since absented himself from you." To these questions objections were sustained. That the statement and questions were highly improper every lawyer must know. To presume that the county attorney supposed or believed them legitimate is to hold him unfitted for the position he was occupying. If there was any reasonable doubt in our minds as to the defendant's guilt, we should promptly reverse this case for these attempts to inject into the case matters which the county attorney must have known were improper. We have often had occasion to comment adversely upon similar conduct, and wish it understood that such conduct merits condemnation. It would have been proper for the trial judge to have warned the jury to avoid being influenced by these outside and improper matters. There could have been no other object in offering this testimony than to

prejudice the jury against the defendant. That it did not have that effect does not excuse the act. In this case we are unable to discover that defendant was prejudiced by the offered testimony. The court below had full opportunity for observing the effect of the attempted introduction of this testimony on the jury, and, by overruling the motion for a new trial, has virtually found it was without prejudice. In view of the entire record, we do not think it can be said that there is a reasonable presumption that prejudice resulted. *State v. Gadbois*, 56 N. W. Rep. (Iowa), 272.

IV. Other errors are assigned. We have considered them, and discover no prejudicial error. **AFFIRMED.**

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97	708
90	538
112	219
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114	492
90	538
134	285

B. F. HERR et al., Appellants, v. Wm. R. HERR et al.

Election by Widow: Will. Where a will devising a life estate to the wife contains no express words barring her dower, an intent to relinquish dower must be manifested; and remaining in possession for life is not sufficient to show such intent. (1)

Mortgaging Dower. The widow may, in equity, convey her dower interest before assignment, and, hence, may mortgage an undivided one third interest in all or any part of the real estate. (2)

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

THURSDAY, MAY 10, 1894.

THIS is an action for the partition of certain real estate, and to cancel a mortgage upon the same, executed to the defendant, William King, by Margaret Herr, now deceased. There was a decree providing for the partition of the property as prayed, but it was held by the district court that the mortgage of King was a valid lien upon the land. The plaintiffs appeal—*Affirmed.*

S. S. Wright and Milton Remley for appellants.

R. G. Cousins for appellees.

ROTHROCK, J.—Christian Herr was the father of the plaintiffs. He died on the eleventh day of March, 1881, seized of the land in controversy. About a year before he died he made his last will and testament. After his death the will was duly admitted to probate, and, as the questions involved in this appeal arise upon the provisions of the will, we will set out so much of said instrument as will be necessary to a fair understanding of the matters in contention between the appellants and the appellees. The testator disposed of his estate as follows:

Second. "I give, devise, and bequeath to my wife, Margaret J. Herr, all my property, real and personal and mixed, of whatever kind, of which I may die seised, to have and to use to her own benefit during the time which she may remain my widow. If at any time she remarry, then whatever property may be remaining in her hands and possession shall be divided between her and my four children, or as many of them as may be living at that time, or if any should be dead, then to their heirs; my wife receiving one third of all property, moneys, and credits, etc., and the residue to be equally divided among my four children or their heirs, as above provided; no money or property to be paid to or delivered to any of my heirs until they have attained their majority. *Third.* In case my wife does not remarry, then at her death it is my desire that whatever there may be remaining of my estate shall be equally divided among my said children or their heirs, as above provided." The land devised by this will consisted of one hundred and forty acres. The widow of the testator occupied and used the land until her death, in the year 1890. While so in possession and occupancy of the land she made and executed a mortgage upon sixty acres thereof to the defendant King to secure the pay-

ment of some five hundred dollars. She died intestate, and no proceedings were had during her life to set off her distributive share or dower in the land. The question to be determined is, had she such an interest in the land that she could execute a mortgage thereon which would be a lien upon her dower interest? The district court decided that the mortgage was valid, and that it was a lien upon the undivided one third of the sixty acres described in the mortgage. The defendant King does not appeal, and we are not required to determine the question whether a widow may incumber by mortgage to the full extent of the value of a specific part of the real estate in which she has a dower interest.

The first objection to the decree by counsel for appellants is that the widow accepted the provisions of the will in lieu of dower, and that all of her interest in the land terminated with her death. There is no evidence of acceptance of the will in lieu of dower other than the fact that she remained in possession of the land. This is entirely consistent with the right to take under the law as well as under the will. The fact that she executed the mortgage in question tends to show that she did not intend to abandon or release her right to her dower interest. We think it must be held that she was entitled to dower in the land. She did not consent to accept the provisions of the will, as required by section 2452 of the Code. It has long been the settled rule in this state that, where there is no express declaration in the will barring the dower of the wife, the intention that it shall be barred must be deduced by clear and manifest implication founded on the fact that the claim of dower would be inconsistent with the will, or be so repugnant thereto as to defeat other provisions of the will. *Corriell v. Ham*, 2 Iowa, 552; *Sully v. Nebergall*, 30 Iowa, 339; *Metteer v. Wiley*, 34 Iowa, 405; *Griffith v. Daugherty*, 4 Iowa, 405; *Daugherty v.*

Daugherty, 69 Iowa, 677, 29 N. W. Rep. 778; *Parker v. Hayden*, 84 Iowa, 493, 51 N. W. Rep. 248.

It is further contended that the mortgage is void because the widow had only a one third interest in the mortgaged property. We do not think this claim ought to be sustained. It is true that a widow has no right to select her dower herself. But she is entitled to an undivided one third in fee, and she could make a valid disposition of her undivided interest without having it assigned, admeasured, or set off. See *Larkin v. McManus*, 81 Iowa, 723, 45 N. W. Rep. 1061. There can be no doubt that in equity a widow may sell and convey her dower interest before assignment, and the grantee may maintain an action for its assignment. *Huston v. Seeley*, 27 Iowa, 183. We think that, if Margaret Herr could have made a valid conveyance of of her dower right in the land, she could incur it by mortgage, and, if she could incur the whole tract, the mortgage upon an undivided one third of any part of the real estate is valid. **AFFIRMED.**

SYLVESTER PHILLIPS *et al.* v. JESSIE G. PHILLIPS *et al.*,
Appellants.

Advancement: Gift: PRESUMPTION. A voluntary conveyance from parent to child is presumed to be an advancement, and the presumption is not rebutted by proof that the father, while unable to speak coherently, made statements equally consistent with an intent to make a gift not to be considered in settling the estate, or with an intent to make an advancement, and as an advancement is a gift, by proof that he frequently spoke of the conveyance as a gift. *KINNE, J.*, took no part.

Appeal from Tama District Court.—HON. L. G. KINNE
and J. R. CALDWELL, Judges.

THURSDAY, MAY 10, 1894.

ACTION in equity for the partition of real estate. There was a hearing on the merits, and a decree in

90	541
102	385
90	541
120	78
120	180
90	541
140	292

favor of the plaintiffs. The defendants Jessie G. Phillips and Bertha M. Phillips appeal.—*Affirmed.*

Powell & Harman and *Chas. A. Clark* for appellants.

H. J. Stiger for appellees.

ROBINSON, J.—On the tenth day of November, 1890, Alford Phillips died intestate. His estate included personal property to the amount of twenty-five thousand dollars after the payment of debts and the expenses of administration, and real estate, not including that in controversy in this action, of the appraised value of ninety-seven thousand, nine hundred and seventy dollars. The defendant Ella C. Phillips is his widow, and the plaintiffs Sylvester Phillips and Belle C. McClaskey, and the defendants Jessie G. Phillips and Bertha M. Phillips, his children. After the death of the intestate, his widow caused her distributive share of his estate to be ascertained and set apart to her, and what was done in that proceeding is not questioned in this action. In January, 1887, Alford Phillips conveyed to the defendants Bertha and Jessie certain farms, and in April, 1890, he purchased, and caused to be conveyed to Jessie, another farm. The conveyances so made were voluntary. The plaintiffs contend that they were intended as advancements to the grantees, and that the farms conveyed should be regarded as a part of the estate of decedent for the purpose of division and distribution thereof, and ask that they be so treated. They also ask for the partition of the real estate which belongs to the estate. The appellants deny that the conveyances were intended as advancements, and insist that they were intended to be in addition to their distributive shares of the estate. They also allege that a conveyance of land made by their father to the plaintiff Sylvester Phillips, in December,

1883, should be treated as an advancement to him. The district court adjudged that all the conveyances were made by way of advancement, and treated the property conveyed as a part of the estate of the intestate for the purposes of dividing, and effecting a partition of, the real estate belonging to it. The value of the advancement made to Jessie was fixed at seventeen thousand, nine hundred dollars, that to Bertha was fixed at seventeen thousand, four hundred dollars, and that to Sylvester at two thousand dollars, and the share of the estate of each of them was reduced by the amount of the advancements so adjudged to have been made.

I. Objection was made by the appellants in the district court to the joinder of their mother, the widow of decedent, as a party defendant. From an order of the court overruling a motion they had filed to dismiss the action as to her they appealed to this court before the cause was heard on the merits. The cause is submitted on the appeal from that order, and on the appeal from the final decree; but as the questions presented on the first appeal, however decided, can not affect the final determination of the cause on the merits, they will not be further considered.

II. The only question we find it necessary to determine is whether the conveyances to the appellants were intended to be advancements. Section 2459 of the Code contains the following: "Property given by an intestate by way of advancement to an heir, shall be considered part of the estate, so far as regards the division and distribution thereof, and shall be taken by such heir toward his share of the estate at what it would now be worth if in the condition in which it was so given to him." It is the rule in this state that a voluntary conveyance from a parent to a child is presumed to be an advancement, and the burden of showing that it is not, is upon the person who claims that

it was not so intended. *Burton v. Baldwin*, 61 Iowa, 286, 16 N. W. Rep. 110; *McMahill v. McMhill*, 69 Iowa, 115, 28 N. W. Rep. 470; *Cecil v. Beaver*, 28 Iowa, 242. This is not denied by the appellants, but they contend that they have overcome the presumption of the law by the evidence which shows that the decedent made and caused to be made the conveyances in question, not by way of advancement, but as gifts, in addition to their distributive share in his estate. It appears that the mother of Sylvester was the first wife of decedent, that the mother of Belle was his second wife, and the mother of appellants was his last one. It also appears that when the conveyances of January, 1887, were made, Sylvester was fifty-three years of age, Belle was twenty-four, Jessie was fourteen, and Bertha was eleven. Sylvester had been married many years, and was the head of a family. Belle had been married about three years, and Jessie and Bertha had been living with their parents. The father was fond of his younger children, but he also had a parent's affection for the older ones. A year or two before the deeds executed in January, 1887, were made, he spoke of making them, and asked if they would be legal. In December, 1886, the congregation of the church which his family attended had a Christmas tree, and he delivered to the pastor in charge a blank deed, with a statement in writing to the effect that certain land was a gift to Jessie, and caused them to be announced as for her when the gifts were distributed. At the time he purchased the farm which was conveyed to Jessie in the year 1890, he said, in effect, that it was to make what she received more nearly equal to that which he had given to Bertha. These and other things of a somewhat similar nature are relied upon by appellants as supporting their claim that the conveyances were not advancements. In our opinion, they do not sustain the claim. For many years before his death the decedent had suffered from

motor or verbal aphasia, and was able to converse only in an incoherent manner by the use of signs and disconnected words. He wrote little, if anything, more than his name, and does not appear to have said much to anyone in regard to his intention in making the conveyances in question, but what he said was as consistent with an intent to make advancements to his daughters as to make gifts which should not be considered in settling his estate. The fact that the conveyances were sometimes spoken of as gifts is not especially significant, as an advancement is a gift. *In re Will of Miller*, 73 Iowa, 123, 34, N. W. Rep. 769.

After a careful consideration of all the evidence, we reach the conclusion that the presumption of law which arises from a voluntary conveyance by a parent to a child must prevail in this case. The findings of the district court in regard to the advancements and their amount are justified by the record, and we discover no sufficient reason for disturbing the decree of that court in any respect. **AFFIRMED.**

KINNE, J., took no part.

JOSEPH McCORKELL, Appellant, v. JOSEPH KARHOFF,
L. M. HARTLEY *et al.*

Sale: Breach of Warranty. A warranty that a stallion sold for breeding purposes is, "a foal getter," is, not satisfied by his getting eight colts on fifty-five services, with proper handling. (1)

SAME: SUIT IN EQUITY TO RESCIND. Where the relief sought is purely equitable, and it was agreed to try the suit in equity, it will lie there, though an action at law for breach of warranty could, as well, have been maintained. (3)

SAME: TENDER. In such equity suit, an allegation that plaintiff is in a position and offers to restore the property had of the defendant, is a sufficient tender. (4)

Pleading, Waiver of Defect in. An objection that oral representations should not be allowed to vary a written warranty, is waived by failure to attack a petition setting up such a variance. (2)

90	545
100	584
90	515
115	504
90	545
120	150
90	545
132	279
133	78
90	545
134	389

Fraud in Sale. Fraud is clearly established where the property during the period it was owned by the seller, at no time, equalled his representations, when selling, as to its qualities. (1)

Appeal from Plymouth District Court.—HON. SCOTT M. LADD, Judge.

FRIDAY, MAY 11, 1894.

ACTION to rescind the contract for the sale of a horse, and cancel a conveyance of land. From a judgment dismissing the petition, the plaintiff appealed.—*Reversed.*

Lewis & Holmes for appellant.

Sawyer & Taft for appellees.

GRANGER, C. J.—I. On the seventh day of January, 1890, the defendant Hartley sold to Howard McCorkell (a son of the plaintiff) a stallion named Hero for the agreed price of one thousand, eight hundred dollars, and two mares for five hundred dollars. In a bill of sale, the stallion was warranted to be "sound and healthy, and, with proper handling, a foal getter." In the petition, besides the averments of a breach of the warranty, it is averred that, to induce McCorkell to purchase the stallion, Hartley verbally represented the stallion to be a sure foal getter, and that he had personal knowledge of the fact that he was, upon which representations McCorkell relied in making the purchase; that the representations were false, and known to be so by Hartley, when made. In payment for the horses, the plaintiff conveyed to the defendant Karhoff one hundred and sixty acres of land, which Karhoff has since conveyed, by quitclaim deed, to Hartley. The consideration for the land, besides the horses, was the payment of a note for three hundred and fifty dollars held by Hartley, on which the plaintiff was a surety.

The plaintiff now offers to restore the property received from Hartley, and asks a rescission of the contract of sale, and a cancellation of the deeds under which Hartley has title to the land. Without objection, the issues have been joined, and a trial had in equity, under averments both as to the warranty and fraudulent representations, and it should be so tried in this court. There is no question but that the horse was sold for service as a stallion. There is dispute, in argument, as to the legal import of the warranty, wherein the horse is warranted, "with proper handling, a foal getter." Appellee's construction seems to be that, if the horse could or "did get foals," the terms of the warranty are met. We are to construe the language of the instrument in the light of the manifest understanding of the parties at the time it was made, and that understanding may be known from the purposes of the sale, as then understood by both parties. As we have said, the horse was bought for service as a stallion, and the warranty was made under a mutual understanding to that effect. Hartley surely understood that McCorkell accepted the warranty as of broader meaning than that any trifling percentage of foals would meet its requirements. He must have known that the warranty was accepted as meaning that the horse was a reasonably sure or safe foal getter. If so, whatever may have been his understanding, he is bound by the understanding of the other party. By Code, section 3652, it is provided: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

We think it was a warranty that the horse could do reasonable service as a foal getter, in view of the fact that he was bought exclusively for such a use. The horse did not meet the requirements of the warranty. With proper handling for the season of 1889,

out of fifty-five mares served, but seven or eight were with foal. The horse was used under conditions to fairly test his capacity under the warranty, and the result was a demonstration that he was not as warranted. We think the representations were also fraudulent. The conveyances were made at the office of Hart & Rishel, at Le Mars, Iowa. Mr. Rishel is a witness, and he says that at the time "Hartley said that the horse was a sure foal getter, and one of the best horses for breeding purposes in Iowa or in the northwest." This is but one of several statements, somewhat similar, made at different times; and there is no doubt, to our minds, that they operated largely to induce plaintiff to execute the conveyance. As indicative of the reluctance of plaintiff to make the deed, and of the purpose of Hartley to induce him to do so, he asked Rishel to, if he could, induce him to make it, and offered him twenty-five dollars for his services, which proposition was declined. At one time he said to the plaintiff, before the execution of the deed, that "the horse could serve eighty or ninety mares, and that he would pay a man a thousand dollars a year in any country." It is manifest that these representations induced plaintiff to execute the conveyances of the land. That they were known to be untrue is a fact hardly open to doubt. Hartley owned the horse in 1887, when he served about fifty mares, and it seems very uncertain how many foals he got. In August, 1887, he was sold to one Schwab, in Kansas, who kept him until November, 1888. In that time he served thirty-three or thirty-four mares, and got fifteen foals; and, because of the failure of the horse to do proper service, the contract was rescinded, and the horse shipped to Iowa, and sold to McCorkell. At no time while Hartley owned the horse had he proved himself equal to the representations made to induce the sale, unless it was in 1886, when, out of the

small number of twelve mares, ten were with foal. If he then was a good foal getter, this decline commenced the next year, and continued to the year 1889; and the fact, up to November, 1888, was known to Hartley, when he sold the horse. The fraud in the sale of the horse is clearly established.

II. It is said that the oral representations can not be considered, because the warranty was in writing. If so, the defect was manifest on the face of the petition, and it should have been attacked by motion or demurrer, and not on issue taken, and objections made on the trial. In fact, the trial seems to have proceeded below on the entire issue, as made.

III. It is said that equity will not grant the relief prayed, because the law furnishes an adequate remedy in an action for a breach of the warranty. The relief sought was such as a court of equity, only, could grant; and by the abstract it appears that, after the issues were formed, it was agreed to try them as an equitable action. Under such circumstances the rule contended for is not to be applied, even though it otherwise could be.

IV. It is contended that there was no tender of the property received from Hartley for the land. The petition specifies that the "plaintiff is in the attitude to restore all of said property," and, in terms, tenders the same to Hartley. In an equity action no more is necessary. *Taylor v. Ormsby*, 66 Iowa, 112, 23 N. W. Rep. 288; *Binford v. Boardman*, 44 Iowa, 53.

There should be a decree rescinding the contract of sale, and canceling the deeds of conveyance to Karhoff and Hartley upon a return of the property received for the land, and the cause is remanded for that purpose.
REVERSED.

STATE OF IOWA V. JOHN H. SHERWOOD, Appellant.

Uttering Forgery. Where one represents the forged instrument to be genuine, and the consummation of his trading it off is prevented by the discovery of the forgery, the offense of uttering is complete. (1)

Note Dated on Sunday. Under Code, 3917, declaring it forgery to falsely make an instrument which creates or, "purports to create," an obligation, a note dated on Sunday may be a forgery where it is charged and proven that it was, in fact, made on a week day. (2)

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

FRIDAY, MAY 11, 1894.

DEFENDANT was tried and convicted of the crime of uttering a forged instrument, and appeals.—*Affirmed.*

H. J. Chambers for appellant.

John Y. Stone, Attorney General, and *Thomas A. Cheshire* for the state.

KINNE, J.—I. This case is submitted on a transcript of the record which embraces copies of the indictment, record entries, motion of defendant for instructions, instructions, motion in arrest of judgment and for a new trial, notice of appeal, and the evidence. The indictment charged the defendant with uttering and passing as true a forged instrument. It also contains this averment: "The said above-described note, although bearing date of Sunday, December 18, 1892, was made and executed on what is commonly a week day, all of which was well known to the said John H. Sherwood at and before the time of the making and execution of the same." It is first contended

90	550
98	683
90	550
102	684
90	550
113	705
90	550
143	582

that there is no evidence showing an uttering of the note. The evidence touching this matter in brief is that defendant, in writing, offered to sell the forged note, and represented that it was given to him and signed by John Van Kirk, whose name appeared thereto as a maker; that afterward, and in furtherance of procuring a sale, defendant made an offer in person to the same party of the note at a certain discount, and passed the note to the person with whom he was negotiating. The sale was not consummated, because the expected purchaser discovered that the note was forged. We think the testimony clearly shows an offer and tender of the note for sale. Our statute provides: "If any person utter and publish as true (any promissory note) knowing the same to be false, altered, forged or counterfeited, with intent to defraud, he shall be punished," etc. Code, section 3918. While ordinarily the offense is completed by an actual sale and delivery of the paper, yet this is not always necessary to constitute the offense of uttering forged paper. *Mathews v. State*, 33 Tex. 102; *People v. Brigham*, 2 Mich. 550; *People v. Caton*, 25 Mich. 388; *State v. Horner*, 48 Mo. 520. The offense of uttering and publishing is proved by evidence of offering to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it is good. 3 Greenl. Evidence, section 110. The evidence warranted the jury in finding that the defendant uttered and published the instrument as true, knowing that it was in fact false.

II. This note on its face, purported to have been executed on Sunday, and hence it is said it was void, so that, even if the signature had been genuine, it could not have been of legal efficacy, or the foundation of a legal liability. The statute defining forgery provides: "If any person, with intent to defraud, falsely make, alter, forge or counterfeit * * * any prom-

issory note, * * * being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property, whatever, is or purports to be created," etc. Code, section 3917. This court has defined forgery to be the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. *State v. Pierce*, 8 Iowa, 231; *State v. Thompson*, 19 Iowa, 299; *State v. Johnson*, 26 Iowa, 413. True, it has been broadly stated that there can be no forgery if the paper is invalid on its face, for it then can have no legal tendency to effect a fraud. *State v. Johnson*, 26 Iowa, 418. It is shown without conflict that the purported maker of this note was not an observer of the seventh day of the week as the Sabbath. We have, then, the question as to whether a note purporting to be dated on Sunday purports to create a liability in such a sense as that the false making or signing of the same may be a forgery. A note made on Sunday, but in fact delivered on a week day is not void. *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. Rep. 331. There is nothing in the note itself, aside from its date, which tends to show when it was delivered. We are cited to no case, nor have we been able to find one, where the facts were the same as in the case at bar. In this case it appears from the uncontradicted testimony that the entire note and signature must have been written on a week day; that the note was dated on Sunday by mistake of the party who drew the body of it for defendant. Now, while it is true that a note in fact made and delivered on Sunday is void, and could not be used in evidence, still, in a civil action, by making proper averments touching a mistake in the date, or that it was, in fact, delivered on a week day, such note would be admissible in evidence, and on proof that it was made or delivered on a week day, it

would be the basis of a legal liability against a genuine maker. The intent to defraud is the gist of the offense of forgery. The fact that the false instrument is such that it is calculated to deceive is a material question on an indictment for forgery. It can not be doubted that a note like that at bar, while apparently void on its face, might, as a matter of fact, be a valid and binding obligation, if genuine, if it appeared that in fact it was made and delivered on a week day. Suppose this was a genuine instrument, and the maker was sued thereon, and the petition, by proper averments, showed that the note was made on a week day, and prayed for proper relief, there could be no doubt, if such allegation was sustained by proper proof, that the validity of the instrument would be established, and a recovery had thereon. It is not, then, necessarily an instrument which is void. That fact may depend upon averments and proof. That it is an instrument, even though bearing date on Sunday, and that it is calculated to deceive, is apparent. Does it "purport," within the meaning of the statute, to create a liability? It will be observed that, under the wording of our statute, the instrument need not in fact create any liability. The language used is: "By which any pecuniary demand or obligation or any right or interest in or to any property whatever, *is or purports to be created.*" Now "purport" means the design or tendency, meaning, import. Clearly the design of this instrument on part of the defendant was to create a legal liability against the one whose name he falsely signed to it. To be within the literal reading of the statute the false instrument may not in fact be such that, if true, it would have created any liability whatever; it is sufficient if it be such an instrument the design or meaning of which is to create such a liability, though in fact it may not do so. We think that the false making of an instrument of this character, even though it bear date of

Sunday, may be a forgery under our statute, when, as in this case, it is made to appear in the indictment and from the evidence that it was in fact made on a week day, and when the testimony shows, as it does in this case, that it was meant and intended thereby to deceive and defraud. To hold otherwise would be not only in violation of the spirit and wording of the statute, but would render the business of the forger profitable and successful. All he would have to do to escape liability would be to date the instrument forged on Sunday. The judgment below is **AFFIRMED**.

J. S. ANDERSON, Receiver, Appellant, v. D. R. KINLEY, Sheriff.

Fraudulent Conveyance: Participation by Corporation.

Where a manager is practically the corporation and does business in its or in his own name interchangeably, as suits his convenience, in a fraudulent conveyance by him to the corporation, the latter has notice of the fraud. *Hummel v. Bank*, 75 Iowa, 690, *distinguished*. (3)

Instruction, Construction of. Where several fraudulent conveyances are charged, an instruction, that, "if any conveyance of said property or any part thereof" was made fraudulently, then, "said conveyances," were void, means that only such conveyances are void as were fraudulent, in whole or in part, and not that if any one of them was, all are. (2)

Assignment of Errors. The objection that an instruction was inapplicable to the issues must be assigned, to be considered on appeal. (1)

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FRIDAY, MAY 11, 1894.

ACTION at law to recover the possession of specific personal property. There was a trial by jury, and a verdict and judgment for defendant. The plaintiff appeals.—*Affirmed*.

N. W. McIvor and Jamison & Burr for appellant.

Rickel & Croker for appellee.

ROBINSON, J.—The plaintiff is the receiver of the Union Investment Company, a corporation organized under the laws of this state. The petition alleges that the company is the unqualified owner of a miscellaneous collection of personal property, particularly described, which is held by the defendant, as sheriff of Linn county, by virtue of an execution issued on a judgment of the district court of that county, rendered in favor of Louis Fitzgerald, trustee, and against George W. Wilson. The answer denies the allegation of ownership, and avers that whatever conveyances of the property have been made to the company were so made or procured by Wilson with the intent, on his part, which was concurred in by the company, to hinder and defraud his creditors. The evidence shows that the property was taken by the defendant, as alleged in the petition, and that notice of ownership was served on him before this action was commenced. Judgment was rendered on the verdict in favor of the defendant for costs.

I. The sixth paragraph of the charge to the jury is as follows: "You are instructed that if you find from the evidence that, after the levy, if any such levy was made by the sheriff upon the legal blanks in controversy, the same were taken from the possession of the said sheriff, by the mortgagee thereof, upon a mortgage made by the owner thereof prior to the date of said levy, then, as to such property, you will find that the plaintiff can not, in any event, recover." The appellant contends that this was erroneous, for the reason that there was no evidence to justify it. We think the reason was not well founded. The evidence that the blanks were taken in the manner contemplated

in the paragraph set out was ample to justify a finding of the jury that they were so taken. It is urged, further, that the paragraph was not applicable to any issue presented by the pleadings. It is sufficient to say that the objection thus made is not presented by the assignment of errors.

II. The seventh paragraph of the charge is as follows: "The defendant claims that whatever conveyances may have been made of said property, or any part thereof, to said Union Investment Company, were made, or procured to be made, by G. W. Wilson, and were made with the intent upon the part of said Wilson and said company to hinder, delay, cheat, and defraud the creditors of said Wilson, and the same were without consideration, except that paid, or procured to be paid, by said Wilson. The burden of proof is upon defendant to establish this defense by a preponderance of the evidence; and upon the same you are instructed that if you find from the evidence that any conveyance of said property, or any part thereof, was made, or procured to be made, by said Geo. W. Wilson to said Union Investment Company with the intent upon the part of said Wilson, and concurred in by the officers of said company, to hinder, delay, cheat and defraud the creditors of said Wilson, and that no consideration was paid therefor, except that paid, or procured to be paid, by said Wilson, then the said conveyances were fraudulent and void, and plaintiff can not recover. If you fail to so find, then you will find for plaintiff, so far as this defense is concerned." The appellant objects to this paragraph on the alleged ground that it, in effect, instructed the jury that if any one of several conveyances to the company, made, or procured to be made, by Wilson, was fraudulent, then all so made were fraudulent. The entire paragraph, especially when considered with other portions of the charge, could not have been understood by the jury in the sense urged

by appellant. The "said conveyances" referred to in the latter part of the paragraph were those made, or procured to be made, by Wilson, with a fraudulent intent concurred in by the company, and we are satisfied from the entire record that the jury must have so understood the charge.

III. Objection is also made to portions of the charge which instructed the jury that if Wilson caused conveyances of property to be made to the company for a fraudulent purpose, when he was its secretary and general business manager, they would be warranted in finding that the company knew of, and participated in, his fraudulent purpose. It is true there are cases where the knowledge of an officer of a company can not be imputed to the company. *Hummel v. Bank*, 75 Iowa, 690, 37 N. W. Rep. 954. But we do not think that rule has any application in this case. The facts are peculiar. It is not practicable to set out the evidence which shows them, but it is sufficient to say that there does not seem to have been any very clear distinction between the affairs of Wilson and those of the company. Business seems to have been done in the name of either one, as suited his convenience and purposes. No satisfactory account of the organization and business of the company is given, but Wilson appears to have owned or controlled a large part of the capital stock, if there was any, and he managed its affairs during the time in question, largely according to his own inclinations, and to advance his own interests; and we think that the company was properly held chargeable with the knowledge of the conveyances in question which he possessed.

IV. Other questions are discussed by counsel, but they do not appear to be of sufficient importance to be mentioned at length. We have considered all objections urged by appellant, but do not find any good reason for disturbing the judgment of the district court. It is, therefore, **AFFIRMED**.

JACOB AURACHER *et al.*, Appellants, v. J. F.
YERGER *et al.*

Religious Societies: Powers of Conference: DELEGATION OF.

Where a body, the supreme executive, legislative and judicial head of a church, is authorized in conjunction with the bishops to fix the time and place of its next meeting, and does, the bishops being present, fix the time, action unanimously taken giving the bishops and others power to select the place, will not be interfered with by the temporal courts, in favor of subordinate conferences which seek to treat the acts of a General conference so appointed as being void.

SAME. Under the rules of the church, the oldest annual conference appoints the time and place of the next General conference, if no action is taken by the General conference. *Held*, that under the facts above set out the said annual conference had no power to appoint.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

FRIDAY, MAY 11, 1894.

THIS is a suit in equity, and it involves a church controversy between two opposing parties, each claiming to be the true adherents of the Evangelical Association of North America. There was a decree dismissing the plaintiff's petition, and they appeal.—*Affirmed*.

Gatch, Connor & Weaver for appellants.

Ed. P. Smith, E. B. Esher, and Read & Read for appellees.

ROTHROCK, J.—The Evangelical Association of North America is a voluntary unincorporated religious denomination, which was organized in this country about the beginning of this present century. Its doctrine, discipline, and church government are all very much like that of the Methodist Episcopal Church. Its

ecclesiastical organization consists of the society or congregation divided into classes. Each congregation holds it quarterly conference, which is the local governing body of each charge, and it meets four times each year. The general association is divided into what are known as "Annual Conferences," of which there are twenty-five in number, each of which holds a session annually; and its membership consists of all fully ordained ministers who have been in the itinerancy. These annual conferences are under the control of what is known as the "General Conference," which meets once in four years. The annual conferences are subordinate to, and are established or abolished, reorganized, or their boundaries changed by the general conference. The annual conferences are presided over by a bishop, if one is present. In the absence of a bishop, the members of the conference are required to elect a president, and the president and the presiding elders of the conference assign the preachers to their respective charges. The general conference consists of one member for every fourteen or fraction of seven or more members of each annual conference, and they are elected by a majority vote of the members of the annual conference. The general conference elects the bishops for a term of four years. The law or constitution of the church is contained in a book called the "Discipline," in which the powers of the different official bodies of the church are prescribed. As pertaining to the powers and jurisdiction of the general conference, the Discipline provides as follows: "Section 72. At general conference a bishop shall preside; but, if there be no bishop present, then the president shall be elected in like manner as at the annual conferences. Two thirds of the aggregate number of delegates shall constitute a quorum. Section 73. The general conference shall have power to make rules and arrangements for our church, under the following restrictions: (1) The gen-

eral conference shall have no power to alter, to detract from, or to add to any of our articles of faith, except with regard to the governments of other nations. (2) It shall have no power to alter any rules or forms of our Church Discipline (the rules of our temporal economy being excepted) unless such alterations are previously recommended by two thirds of the members of all the annual conferences, who may be present at the sessions of the same; whereupon the general conference shall have power, by a majority of three fourths of their votes, to alter any of our rules or forms, excepting the Articles of Faith. It shall also have power by three fourths of its votes to recommend to the annual conferences an alteration of any one of said rules or forms; and, after such alteration shall have been approved by two thirds of the members present at the sessions of all the annual conferences, it shall, by our bishops, be declared a law, and introduced as such into our Church Discipline. Section 74. The general conference is the supreme court of law in the church. It shall decide upon the legality of all acts of annual conferences, and upon all such cases as may arise between the annual conferences, and such as may arise between any incorporated society of the church and and its officers or any annual conference; and in its judicial capacity it shall decide, render verdict, and declare judgment only on such cases as are lawfully brought before it for adjudication."

A general conference of the association was held at Buffalo, in the state of New York, in the year 1887. There is no question made as to the legality of that conference, and, so far as appears, there were then no differences in the association at large. The proceedings of that conference, so far as the record before us shows, do not disclose that there were opposing factions in the church. There may have been dissatisfaction and objection to some of the officers of the confer-

ence, but it does not appear that there was any active disturbing element. The next general conference was required to be held in the year 1891. The Discipline provides that the time and place for the general conference shall be appointed as follows: "Section 71. The time and place of the general conference shall be appointed by the bishops, with the consent of the majority of the conference; and, if there be no bishop present, the general conference shall do it by a majority of votes, or the oldest annual conference, who then shall give the other annual conferences due notice of the time and place." The general conference at Buffalo in 1887 adopted the following resolutions: "Resolved, that the next session of the general conference shall begin on the first Thursday in October, 1891." "Resolved, that the matter of appointing the place of the next general conference be referred to the board of publication." These resolutions were unanimously adopted. No question was raised by any member of the conference as to the power of the bishops and the conference to refer the naming of the place of the next general conference to the board of publication.

It should be stated in this connection that it was the usual custom for different societies or charges to make known to the general conference a desire to have the next conference to meet with them. There was but one such invitation presented to the Buffalo conference, and before that order of business was reached in the deliberations of the conference the invitation was withdrawn, and it is apparent that no place could then be named without the risk of the meeting of the next conference at a place where the local society had made no offer to extend the hospitality usually accorded to general conferences of the association. The board of publication is composed of the bishops of the church and eight other persons, selected from eight districts, into which the general association is divided. We do not understand that any claim is made that the members of

this board were not capable of making a judicious and proper selection of the place for the next meeting of the conference. The contention of appellants is that the Buffalo conference had no lawful or constitutional power to refer the selection of the place to any committee or board, nor to any other agency. In October, 1890, the board of publication, in pursuance of the authority of the general conference, appointed the place for the next meeting of the general conference at Indianapolis, in the state of Indiana, and publication of the place selected was at once made in the newspapers and periodicals of the denomination. Bishops Bowman and Esher were present at this meeting of the board, and no question is made that the board was not lawfully convened. In the meantime serious controversy had arisen among some of the members of the association, which involved opposition to the bishops of the church, and a church court was convened, and all the bishops were deposed from office. If this church trial was legally convoked, and its proceedings valid, its judgment against the bishops suspended them from office until the next general conference. Bishop Dubs accepted the order of suspension, but Bishops Bowman and Esher claimed that the whole proceedings against them were absolutely void. Afterward and in February, 1891, the East Pennsylvania conference, claiming to be the oldest annual conference, held its annual session, and, assuming that the resolutions of the Buffalo general conference, authorizing the board of publication to name and appoint the place of meeting of the next general conference were void, named the city of Philadelphia as the place for that meeting. This conference refused to recognize Bishop Bowman, under the claim that he had been suspended from his office of bishop. This was the beginning of what afterward culminated in a division of the church into two contending parties. An alleged general conference was held at Philadelphia,

and another at Indianapolis, at the time appointed by the general conference at Buffalo, each claiming to be the lawful general conference. The Indianapolis conference reversed the proceedings of the church court which suspended the bishops, and held the judgment of suspension to be absolutely void, and reelected Bishops Bowman and Esher for the ensuing four years. The Philadelphia conference ratified the suspension, but reelected Bishop Dubs and two others to the office of bishop. Of the twenty-five annual conferences which were represented in the two claimed general conferences eighteen unanimously accredited their delegates to the Indianapolis conference, being of the opinion that the suspension of the bishops was wrongful and void, and that Indianapolis was lawfully selected as the place to hold the conference. In five of the remaining annual conferences Bishops Bowman or Esher appeared to preside over their deliberations, and were excluded, and the conferences divided, each claiming to be the lawful annual conference. Those belonging to what is commonly known as the "Bowman and Esher party" selected delegates to the Indianapolis conference, and the "Dubs party" selected and sent their delegates to the Philadelphia conference. There were but two of the annual conferences which adhered without division to what is known as the "Dubs Party." When the two general conferences convened, it was found that the total membership of the Indianapolis conference was one hundred and that of the Philadelphia conference forty-six.

The controversy involved in this action originated at the Des Moines annual conference, which was held in the city of Des Moines in the year 1890. The members of that conference were rightly convened. Bishop Bowman appeared, and proposed to preside at the conference. A large majority of the conference refused to recognize him as bishop, and he, with a minority of six,

withdrew, and organized and held a conference at another place. Each one of these claimed conferences held meetings in 1891, and each assumed to appoint preachers to the different churches or charges in the conference. The plaintiffs in the action are preachers representing the majority annual conference, and they belong to what is known as the "Dubs Party," and they demand that the defendants, who are preachers representing the Bowman and Esher annual conference, be restrained from attempting to occupy the pulpits of certain church buildings as ministers of the Evangelical Association, because the plaintiffs are invested with that right, being the regularly appointed preachers in charge.

We have given a sufficient statement of facts to disclose the questions involved in the controversy. If the Indianapolis general conference was according to the law and discipline of the denomination the regular general conference, and if its acts in declaring the suspension of Bishops Bowman and Esher absolutely void from the beginning were authorized and valid, we think the plaintiffs have no standing in a court of equity. It is apparent that there is but one regular Evangelical Association. No one claims that there are two such religious denominations. One party to the controversy in this suit must be held to represent the association, and when that question is determined it appears to us there is no other question which demands serious consideration. Either the Indianapolis conference or the Philadelphia conference was the legal and authoritative supreme head of the association. This is not a case of a separation or schism of a denomination involving differences of views as to religious doctrine or faith. In such cases it is everywhere held that the party adhering to the established faith and belief of the church is the lawful body, although it may be in the minority. The question as to the power of the bishops and a majority of the Buffalo conference to

select and appoint the place of the next meeting by referring the matter to a committee must be determined by the proper construction of section 71 of the Discipline, which is above set out. The question has been elaborately discussed by counsel, and many authorities have been cited in arguments in behalf of both parties. It is not our purpose to review the decisions of other courts. From the very nature of the section of the Discipline involved in the controversy, no case can be found which is in all particulars like this, with the exception of two cases hereinafter referred to. It appears to us that there are some questions presented in argument which are not necessary to be considered in determining the main question presented by the record. It is claimed that consideration should be given to the fact that the Des Moines annual conference, which convened in 1890, acted in good faith in refusing to recognize the right of Bishop Bowman to preside over that body; and it is further contended that the action of the Indianapolis conference in reviewing the suspension of the bishops was *ex post facto*, and in the nature of a bill of attainder, because, by the discipline of the church, the bishops were suspended, and not authorized to act in the interim between the judgment of suspension and the action of the general conference which declared the suspension void. It appears to us that all these questions, and others which are urged, are immaterial, because the plaintiffs in this case, who are preachers, are acting under alleged appointments to charges made since the general conferences were held in 1891; and, if the Indianapolis conference was the proper and rightful general conference, it was the duty of the plaintiffs to recognize its authority in all church affairs after that time.

This action was commenced in April, 1892, and the appointments of the plaintiffs to their present positions were made by what is known as the "Dubs Party"

in March, 1892, some six months after the the Indianapolis conference was held. There can, therefore, be no just claim that the action of the Indianapolis conference was after the fact, or *ex post facto*, so far as the rights of the plaintiffs are now involved. As we have stated, the Buffalo conference fixed the time for the meeting of the next general conference. Had it the power to authorize the board of publication to appoint the place of said meeting? Or, in other words, was the delegation of the authority to appoint the place such a manifest departure from the law of the church as found in section 71 of the Discipline as to be void? Counsel have elaborately discussed the question whether the exercise of the authority to appoint the place was an executive, legislative, or judicial act. We think it unnecessary to determine that question. It is to be remembered that the general conference is the supreme executive, legislative, and judicial head of the denomination. The oldest annual conference was not invested with any original authority to act in the premises. It could appoint the place only in case the bishops and a majority of the conference failed to act on that matter. But the conference did take action, and we think the reference of the place to the board of publication was not such a departure from the letter or spirit of the Discipline of the church as to authorize civil courts to declare the action of the conference void. It is not the province of temporal courts to assume ecclesiastical jurisdiction. The decisions of proper church tribunals must be accepted as conclusive, and are not subject to review. In 1 High on Injunction sections 310, 314, it is said: "The principle may now be regarded as too well established to admit of controversy that, in case of a religious congregation or ecclesiastical body, which is in itself but a subordinate member of some general church organization, having a supreme ecclesiastical judicatory over the entire membership of the organization, the

civil tribunals must accept the decisions of such judicatory as final and conclusive upon all questions of faith, discipline, and ecclesiastical rule." We regard the above as a clear statement of a rule which has long been established in the courts of this country, and we adopt it without a review of the numerous cases cited by counsel.

We might extend this opinion to a great length by considering the manner in which the general conference regarded this and other provisions of the law of the church. There is a history or line of precedent acts of former general conferences which strongly tend to show that by the general usages of the church a mere subordinate incidental provision like the one now in dispute was not regarded of such importance as to demand the strict and mandatory construction of the Discipline contended for by the appellants. If such mere matters of detail are required to be so magnified, if the next general conference should appoint the city or town where the succeeding conference should be held, and should fail to designate the particular church edifice by street and number, the claim might be preferred that no selection of a place was made, and the oldest annual conference, an inferior and subordinate judicatory, would again assume to overrule the supreme court of the association. The contention of the appellants is not that the Dubs party and the East Pennsylvania conference acted in ignorance of the fact that the board of publication had appointed the place for the conference. Every reader of the church periodicals knew that the conference was to be held at Indianapolis, and the action of the East Pennsylvania conference was had for the very purpose of overruling and disregarding the action of the Buffalo conference. But we do not think further elaboration is necessary. In our opinion, the appointing of a place for the meeting of the next conference was merely an ecclesiastical matter, which

involves no property or civil rights, and over which the highest judicatory of the church has supreme control; and that the plaintiffs in this case can not be allowed to question the correctness of the action of the Buffalo conference. The Indianapolis conference was the lawful high church court of the association, and was authorized by the constitution of the church to review and declare void the proceedings which resulted in the alleged suspension of the bishops, and to elect others for the constitutional period, and that the annual conferences over which they presided are the lawful conferences of the association.

The precise questions involved in this case were determined by the supreme court of Illinois more than one year since in an elaborate and well considered opinion (*Schweiker v. Husser*, 34 N. E. Rep. 1022); and practically the same questions were determined by the supreme court of Ohio, March 20, 1894, in which no opinion was filed. The decisions in those cases appear to us to correctly determine the issues between these parties to this unfortunate controversy. The decisions in the cited cases are in line with the views we have herein expressed, and it appears to us to be highly important that there should be a consensus of judicial authority on the question, for the reason that conflicting decisions will tend to continue unnecessary strife and contention, which should forever cease. The decision in the case in the Ohio courts was pleaded in this case as an adjudication. We have not thought it important to determine that question, because we are well satisfied to dispose of the case upon its merits. The decree of the district court is **AFFIRMED**.

STATE OF IOWA V. BURT RUSSELL *et al.*, Appellants.

Drawing Grand Jury: More Than One Juror From a Township. Where a district contains as many townships as there are grand jurors to be drawn, an indictment found by a jury having more than one member from one township should be set aside on motion made by defendants who have had no opportunity to challenge the panel. Code, section 241, as amended by Acts, Twenty-First General Assembly, chapter 42, section 2; Code, sections 4260, 4337.

Grounds of Challenge. An indictment for adultery against a woman will not be set aside because her husband's brother was one of the jurors who found it. Code, sections 4261, 4337. (2)

Commencing Prosecution for Adultery: Subsequent Divorce. Where a husband begins a prosecution for adultery against his wife, a subsequent divorce does not abate the prosecution, nor render him incompetent as a witness. (3)

Appeal from Harrison District Court.—HON. A. VAN WAGENEN, Judge.

SATURDAY, MAY 12, 1894.

THE defendants were charged by indictment with the crime of adultery. There was a trial, a verdict of guilty, and a judgment on the verdict. The defendants appeal.—*Reversed.*

Sanford H. Cochran for appellants.

John Y. Stone and *Thos. A. Cheshire* for the state.

ROBINSON, J.—The indictment alleges that the crime charged was committed on the fifth day of September, 1892, in Harrison county, in this state, by the defendants, who then and there had sexual intercourse with each other. At that time the defendant Emerine Russell was the wife of James Coulthard. He voluntarily appeared and testified before the grand jury, and

asked that the defendants be dealt with according to law. At that time an action for divorce, instituted by his wife, was pending, and the divorce was afterward granted to her. She then married her codefendant, Burt Russell.

I. The defendants had not been held to await the action of the grand jury, and had no opportunity to object to it until after the indictment had been found. Before pleading to it they moved to set it aside on two grounds, the substance of the first of which is that the grand jury by which the indictment was found was illegal, for the reason that two of its members were residents of the same township. The motion was overruled. As we understand the record, at the term of court at which the indictment was found, and after it was returned, the grand jury was discharged on motion of the county attorney, for the alleged reason that two of the grand jurors resided in the same civil township, "and did at the time the grand jury were drawn." We do not think that action of the district court was such an adjudication of the legality of the grand jury as to affect the liability of the defendants under the indictment found, and that must be determined on the merits, without regard to the action of the court in discharging the jury. Grand jurors are drawn substantially as follows: On or before the first Monday of September of each year the county auditor apporitions the number to be selected from each election precinct, the number amounting in the aggregate to seventy-five, and causes written notices of the apportionment to be delivered to one of the judges of election in each precinct. The judges thereupon select the required number of persons, and return their names to the county auditor with the election returns. Code, sections 234, 236-238. The returns thus made necessarily show the township in which each one of the seventy-five jurors resides. When a grand jury is

to be drawn, the county auditor or his deputy is required to write out the names of persons on the list on separate ballots. *Id.*, section 240. The drawing is conducted as follows: After thoroughly mixing the ballots so prepared, "the clerk or his deputy shall draw therefrom the requisite number of jurors to serve as aforesaid, and shall, within three days thereafter, issue a precept to the sheriff, commanding him to summon the said jurors to appear before the court as provided in section 230 of the Code. When the grand jury shall be composed of five jurors only, the number drawn shall be eight, and when the grand jury shall be composed of seven members the number of grand jurors to be drawn shall be twelve; provided that in drawing such grand jury not more than one person shall be drawn as a grand juror from any civil township, excepting where the grand jury is by law required to be drawn from a district containing fewer civil townships than the number of grand jurors required to be summoned; in which case, if the number of civil townships in such district be not less than one half of the number of jurors required, not more than two persons shall be drawn as grand jurors from any such township; and, if the number of civil townships be less than one half of the numbers of jurors required, not more than three persons shall be drawn as grand jurors from any such township. If more persons shall be drawn from any civil township than are hereby authorized it shall be the duty of the officer drawing such grand jury to reject all superfluous names so drawn, and to proceed with the drawing until the required number of jurors shall be secured." Code, section 241, as amended in 1886 by section 2, chapter 42, Acts, Twenty-First General Assembly. It has been decided frequently that, when there has been a substantial compliance with the provisions of the law in drawing a grand jury, an indictment returned by it should

not be set aside on account of some slight departure from the statute in the drawing, and some of its provisions have been held to be directory. *State v. Ansa-leme*, 15 Iowa, 44; *State v. Knight*, 19 Iowa, 94; *State v. Carney*, 20 Iowa, 83; *State v. Brandt*, 41 Iowa, 600.

It is claimed that the provisions of the statute now under consideration are directory, and that the motion to set aside the indictment on the ground stated was properly overruled. But none of the cases cited arose under the statute of 1886, and the part of that statute quoted has not been held to be directory merely. The case of *State v. De Bord*, 88 Iowa, 103, 55 N. W. Rep. 79, was decided since it was enacted, but construed other provisions of the law. In *State v. Beckey*, 79 Iowa, 368, 44 N. W. Rep. 679, it appeared that a grand jury had been drawn in manner as follows: The ballots containing the names returned from each of fifteen townships were separated and sealed in separate envelopes. Those were placed in a box, from which twelve envelopes, that being the required number of jurors, were drawn. The ballots in each envelope were then taken out, placed in a box, and one ballot drawn therefrom, and the person named on the ballot drawn was summoned as the juror from his township. It was held that there was a substantial departure from the requirements of the statute, and that an indictment found by the grand jury so drawn should be set aside. It appears to us that the same conclusion must be reached in this case. It is the general rule that "negative terms in a statute show a legislative intent to make the provision imperative requiring a strict performance in respect to both time and manner." 23 Am. and Eng. Encyclopedia of Law, 455, note 3; Suth. St. Const., section 454; *State v. Hilmantel*, 21 Wis. 571; *Bladen v. Philadelphia*, 60 Pa. St. 464. The statute in question does not merely direct the manner of drawing jurors, but pro-

vides that "not more than one person shall be drawn as a grand juror from any civil township," excepting in certain cases, when it becomes necessary to do so; and, in the excepted cases, the number which may be drawn from one township is made as small as is practicable. The statute not only prohibits the drawing of more than one juror from one township in such cases as this, but provides expressly that if more are drawn it shall be the duty of the officer drawing the jury to reject all superfluous names. It would be difficult for language to express more clearly the legislative intent to prevent the drawing of more than one juror from a township in counties or districts having as many townships as there are jurors to be drawn. It was the intent of the general assembly to secure impartial grand jurors, as free from local prejudice and undue influence as possible. Jurors are more likely to be influenced by the excitement and prejudice of their locality than are those who reside at a distance from it. If two jurors may be drawn from one township, the entire panel may so be drawn. Jurors prejudiced or unduly influenced by excitement may not only exercise an undue influence to secure indictments which should not be found, but also to defeat the finding of indictments which the evidence before the grand jury demands. It was, no doubt, to prevent such evils as these that the statute of 1886 was enacted; but, under the construction contended for by the state, the legislative intent might, to a material extent, be defeated by careless or designing officers. Section 4260 of the Code authorizes a challenge to the panel when not drawn as required by law, but the defendants had no opportunity to make such a challenge. A motion to set aside an indictment may be made under section 4337 of the Code, and must be sustained when the grand jury "were not selected, drawn, summoned, impaneled or sworn as prescribed by law." It is clear that the

grand jury in this case was not drawn as prescribed by law. Section 4538 of the Code provides that, "if the appeal is taken by the defendant from a judgment against him, the supreme court must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands." But it can not be said that the error in this case was purely technical, or that it appears that the substantial rights of the defendants were not affected. We conclude that a motion to set aside the indictment should have been sustained on the ground stated.

II. The remaining ground of the motion to set aside the indictment is that John Coulthard, a brother of James, was a member of the grand jury, and took part in its proceedings. That alone would not have been a sufficient cause for which to challenge the juror. Code, section 4261. Nor does the statute make it a ground upon which the indictment may be set aside. *Id.*, section 4337. The motion as to that ground was properly overruled.

III. James Coulthard, the husband of Mrs. Russell at the time the offense charged is said to have been committed, was permitted to testify on the trial as a witness against the defendants. It is insisted that his testimony was not competent, because she had ceased to be his wife at the time it was given. The argument in support of that claim seems to be that, as section 4008 of the Code provides that "no prosecution for adultery can be commenced but on the complaint of the husband or wife," the right to maintain the prosecution depends upon the continuance of the marriage relations; that the crime is against the injured party to that relation; and that public policy demands the discontinuance of the prosecution when that relation ends. It is only necessary that the prosecution be commenced by the husband or wife. After

that is done, it may be continued without further appearance or action on the part of the one who commenced it. *State v. Briggs*, 68 Iowa, 419, 27 N. W. Rep. 358. If the offense was committed, the husband had the right to commence the prosecution, and the subsequent divorce and remarriage of the wife did not cancel the offense, nor bar the prosecution for it; and that is true, whether the crime be regarded as against the husband or as against the state. The testimony of Coulthard was, therefore, properly received in evidence.

IV. In view of the conclusions announced, it is unnecessary to consider other questions discussed by counsel. For the failure of the district court to set aside the indictment on the first ground of the motion which assailed it, the judgment is REVERSED.

B. F. TREANOR, Appellant, v. THE SHELDON BANK *et al.*

Resisting Foreclosure of Chattel Mortgage: Injunction Not Exclusive Method. The pendency of a replevin suit to recover mortgaged property in order to foreclose upon it, enables the mortgagor to assert usury against the mortgagee, in that action, and, hence, bars one to enjoin foreclosure, under section 3317, Code.

90	575
114	384

Appeal from O'Brien District Court.—HON. F. R. GAYNOR, Judge.

SATURDAY, MAY 12, 1894.

THE plaintiff commenced this action in equity to enjoin the defendants from foreclosing a chattel mortgage upon the ground that the debt secured thereby was largely made up of usurious interest. There was a hearing on the merits, and a decree for the defendants. Plaintiff appeals.—*Affirmed.*

J. H. Scales and *Daniel Eiler* for appellant.

Boies & Roth for appellees.

ROTHROCK, J.—I. It appears from the pleadings in the case that the plaintiff executed a chattel mortgage to the defendant bank, dated September 30, 1889. In the month of October, 1890, the defendant demanded possession of the mortgaged property for the purpose of foreclosing the mortgage. The plaintiff refused to deliver the property, and the bank commenced an action of replevin, and the property was seized and advertised for sale to pay the mortgage debt. So far as appears, the petition, bond, and writ in the replevin suit were in proper form. The mortgage debt was due and, on the face of the transaction, the bank had the right to foreclose its mortgage. This suit in equity was commenced to restrain and enjoin the foreclosure of the mortgage, upon the ground that nearly all of the amount of the mortgage debt was usurious. The defendants answered, denying the allegations of the petition as to usury, and the pendency of the action of replevin was pleaded as a defense. The plea of another action pending was full and explicit, and the pleadings in the replevin suit were introduced in evidence on the hearing. The question was fairly presented, but, so far as the record shows, no attention was given to it in the court below by the plaintiff, and, so far as we are advised, the action of replevin is now pending and undisposed of.

One of the grounds of demurrer to a petition is "that there is another action pending between the same parties for the same cause." Code, section 2648. The bank could not demur because the ground of demurrer did not appear on the face of the petition. In such case it is required that the objection shall be taken by answer. Code, section 2650.

It is claimed by appellant that the two actions are unlike because the issues are not the same; and, to support this contention, our attention is called to the supposed cause of detention set out in the petition in the replevin suit. That cause is alleged to be that there was a prior mortgage on the property. The cause of detention is a formal averment required to be made in the petition. It does not make an issue between the parties. There was, in fact, no issue made in the replevin suit. But it was an action involving the right of the mortgagee to foreclose his mortgage, and the defendant in that action was called upon to interpose any defense he had to the foreclosure. He could plead usury, payment, or any other defense to the mortgage debt. He did not do that, but commenced this independent action in equity, and he claims that he has the right to maintain the action under section 3317 of the Code, which is as follows: "The right of the mortgagee to foreclose, as well as the amount claimed to be due may be contested by anyone interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may be issued if necessary." It has been held by this court that the right to maintain an action under this section of the statute is not absolute. It was so held in *Sweet v. Oliver*, 56 Iowa, 744, 10 N. W. Rep. 275, where the following language was employed: "We do not believe the meaning and intent of the statute is that an injunction should issue and the transfer be made in all cases as a matter of right, but that it may be done when necessary to protect the rights of anyone interested. If there is a full and complete remedy at law, then the general rule applies that a resort to equity can not be sanctioned." So in the case at bar. Every right of the plaintiff herein could have been fully protected in the action of replevin, and

he had no right to resort to an independent action in equity. We are thus met with this question at the threshold of the consideration of the case. We are not at liberty to pass it, and decide whether the claim of usury was established by the evidence. The decree will be affirmed, but without prejudice to the plaintiff to make such a defense as he may have in the action of replevin, if that action is yet pending. **AFFIRMED.**

90 578
104 322
90 578
121 387

MINNIE SHAFFER *et al.* v. JOSEPH R. McCrackin *et al.*,
Appellants.

Paid Judgment: Execution Sale: Proof of Payment. Payment of a judgment to the attorneys who obtained it may be shown by parol evidence. (1)

SAME. An account book of such attorney (deceased) is incompetent to show that no such payment was made, especially where no statutory foundation is laid, and in absence of proof that it is the only account book of the attorney. (2)

Title on Sale Under such Judgment. When a judgment is in fact paid, though unsatisfied of record, a sale thereunder conveys no title. (3)

HOLDER OF SHERIFF'S DEED: NOT IN POSITION OF CREDITOR. Where the execution defendant, in whom the legal title is, desires to consummate an express trust in parol by placing the title in the heirs of his wife, those heirs have standing in an action to set aside a void sheriff's deed, and to quiet title to the land covered by it, and the holder of such deed can not object to the consummation of such trust. (3)

Appeal from Jefferson District Court.—HON. H. C.
TRAVERSE, Judge.

SATURDAY, MAY 12, 1894.

ACTION to set aside a sheriff's sale of certain premises, and to quiet the title to the same in the plaintiffs. Decree for plaintiffs, and the defendants appeal.—*Affirmed.*

Leggett & McKemey for appellants.

Jones & Fullen for appellees.

GRANGER, C. J.—Barbara Iver was a judgment creditor of John G. Weitzel, in the sum of three thousand, nine hundred and ten dollars and fifty cents. On this judgment there are conceded payments of three thousand, five hundred and twenty dollars and fifty-six cents, made on and before June 1, 1870. Barbara Iver died, and, by bequest, her husband, John Iver, became the owner of the judgment, which he assigned to the defendant Joseph R. McCrackin, who took execution on the judgment, levied on the land in question, and after sale, and the expiration of redemption, he took a sheriff's deed therefor. Minnie Shaffer and her coplaintiffs are heirs of Amelia Weitzel, deceased, who was the wife of John G. Weitzel, in whom, they allege was the title to the land, and they aver that it was not the land of John G. Weitzel at the time of the levy and sale, but that of Amelia Weitzel, and that her heirs are the owners thereof. Some conveyances of the land were made that need not be set out. They also allege that, prior to the assignment of the judgment to defendant McCrackin, it had been fully paid, and issue was taken thereon. The payment, if made, was to the attorneys of Barbara Iver, Slagle & Acheson, who represented her in her suit in which the judgment was obtained. Slagle and Acheson are both deceased. The payment, if made, was about seven hundred dollars. The district court took the case under advisement, and prepared the following opinion, showing its conclusions of fact and law:

"I. Was the judgment on which the land in question was sold, paid off before the sheriff's sale? This will depend on whether the alleged seven hundred dollars payment on said judgment was in fact made. The

payment of a judgment may be proved by parol evidence. *Hollenbeck v. Stanberry*, 38 Iowa, 325. Payment made to the attorney of record who procured the judgment, before his authority is revoked, or before due notice of such revocation is given to the judgment defendant, is binding on the judgment plaintiff. 2 Black. on Judgm., section 986. The assignee of a judgment takes it subject to all equities and defenses. *School District v. Schreiner*, 46 Iowa, 172. Mr. I. D. Jones testifies that the alleged seven hundred dollars payment was in fact made within his personal knowledge. This testimony is competent and pertinent. It can not be disregarded. And Mr. Jones, in his evidence, states the circumstances of said payment so clearly, so fully, and with such minuteness of detail, that I am not at liberty to say that he is mistaken, or that the facts have faded from his memory.

“II. What evidence is produced against this positive testimony of Mr. Jones? Really, there is none. The account book of Messrs. Slagle & Acheson, to prove the nonpayment of the seven hundred dollars, is incompetent—*First*, because items of money received or paid are not the subject of book account, and can not be proved in that way (*Veith v. Hagge*, 8 Iowa, 163); *Young v. Jones, Id.*, 220); *second*, the proper foundation was not laid for the introduction of said book (McClain’s Code, section 4908; 1 Greenl. Ev., section 118, note); and, *third*, the book being introduced to prove a negative, it should for that reason be shown that all the account books of Slagle & Acheson, likely to contain the seven hundred dollars item, are before the court. How can you prove that an item was not entered on any book by simply introducing one book in evidence, and without showing that to be the only account book?

A sale of property under a judgment which has been satisfied is void, even though the satisfaction does

not appear of record, and the purchaser has no knowledge that the judgment has been paid. 12 Am. and Eng. Encyclopedia of Law, p. 150e, note 6, and authorities there cited; *Craft v. Merrill*, 14 N. Y. 456; *Carpenter v. Stilwell*, 11 N. Y. on page 71. The judgment is the power back of, and authorizing, the execution sale. If the judgment has been paid off, the power is gone, and no title passes, even to an innocent purchaser. He who buys at a judicial sale must, at his peril, see that there is a valid, subsisting power to make the sale. See authorities last cited; and, especially, see *Craft v. Merrill*, 14 N. Y. on page 461, and *Carpenter v. Stilwell*, 11 N. Y., on page 71. If the judgment in question was satisfied before the sheriff's sale, as I think the evidence shows, then J. R. McCrackin acquired nothing by his purchase. He has no right, title, or interest whatever in the premises in dispute.

III. "But what right, title, or interest in said premises have plaintiffs, or the other parties to the suit? It may be truly said that they must recover, if at all, on the strength of their own right, and not on the weakness of McCrackin's claim. Yet they need not have a perfect title to said premises, as against J. R. McCrackin. If they have any right or equity therein, they should be protected as against him who has no right whatever. It matters not that other persons may be able to assert rights in said premises as against plaintiffs. That fact, if it exists, can not prejudice Mr. McCrackin, whose interest in the land may be represented by zero. See, as bearing on this question, *Craft v. Merrill*, 14 N. Y. 456. Before proceeding to point out what I conceive to be a tenable ground on which plaintiffs can stand, let me say that, in my opinion, their counsel must abandon the claim that Amelia and J. G. Weitzel conveyed the land in question to Peter Roth in trust for Amelia's heirs. Such an

alleged trust would be an express trust, and would have to be in writing. Code, section 1934; *McClain v. McClain*, 57 Iowa, 167, 10 N. W. Rep. 333. Roth and wife conveyed the land to J. G. Weitzel. Weitzel claims that this is not what he wanted. He desired the premises conveyed to his and Amelia's children, or to someone in trust for them. Weitzel claims that he never accepted Roth's deed, and tries to repudiate said conveyance. But I think the weight of the evidence shows that J. G. Weitzel solicited Roth to convey the land to him, and that said conveyance is valid and binding as between the parties. Roth no longer claims the premises under the deed from Amelia and J. G. Weitzel to him. J. G. Weitzel is willing and anxious that his and Amelia's children should have the land. J. R. McCrackin can not object to such a consummation. No one can, unless it be creditors, if any, of J. G. Weitzel. If there be such creditors, their rights could not and are not attempted to be determined in this suit."

Our consideration of the evidence leads us to the same conclusion as to the fact of payment. The legal conclusions are supported by authority, and, in so far as they are essential to a conclusion of the case, they are approved, and the judgment will stand **AFFIRMED**.

Jos. HOWE *et al.*, Appellants, v. W. M. HOWE *et al.*

Tenancy in Common: What Terminates. Where heirs to land agree that one of them shall procure a tax title and convey it to their mother, the tenancy in common ends. (1)

SAME: ADVERSE POSSESSION. If the mother agrees that the tax title procured shall vest in the heir who procures it, and he takes possession of the land and pays taxes upon it, such possession is adverse to the other heirs. (2)

Appeal from Linn District Court.—HON. JAMES D. GIFFEN, Judge.

SATURDAY, MAY 12, 1894.

ACTION in equity to quiet title to a certain four acre tract of land. Decree was entered dismissing plaintiffs' petition, from which decree they appeal.—*Affirmed.*

Rickel, Crocker & Christie for appellants.

Davis & Voris for appellees.

GIVEN, J.—I. Morris Howe died intestate about the year 1857, seized of the four acres of land in controversy. The plaintiffs and defendants are all heirs at law of the said Morris Howe, some being his children, others being his grandchildren, and each entitled to a share in said land, unless such right is defeated by the facts alleged and proven. The following facts appear without dispute, or are fairly established by the evidence: Morris Howe left surviving him Matilda Howe, his widow, who continued to occupy and reside upon the land after his death until about the year 1873 or 1874, when the dwelling house was destroyed by fire, after which she resided at Troy, in Linn county, until her death, in 1882. After the death of Morris Howe it was agreed among his children that their mother, Matilda Howe, was to have the land, and that, in order to carry out that agreement, John A. Howe was to procure a tax deed running to him, and was then to deed the land to Mrs. Howe. Mrs. Howe paid the taxes up to and including 1874. In 1876 the land was sold for the taxes of 1875, and John A. Howe afterward procured an assignment of the certificate, on which he received a treasurer's deed on July 30, 1881, which was recorded August 3, 1881. After the destruction of the dwelling, the land was only available for use

as a pasture, and of but little value for that, the value of its use not being equal to the amount of its taxes. For these reasons Mrs. Howe declined to pay any more taxes, and so informed John A. Howe, and also told him that he could have the land if he wanted to take it and pay the taxes. John A. Howe took sole possession of the land in 1876 or 1877, built some fence thereon, and continued to occupy it and to pay the taxes up to the time of his death, in 1886. Because of his agreement with his mother that he should take the land, he never executed a conveyance to her after acquiring the tax title. John A. Howe left a will devising this land to the defendants, his children, and they have been in sole possession and have paid all taxes since his death. Neither of the plaintiffs, nor any person for them, has at any time prior to the commencement of this action asserted any claim or right in said land, or to the rents thereof, nor have they offered to pay the taxes or to refund any part of the taxes paid.

II. Plaintiffs rely upon the familiar rule that seisin and possession of one tenant in common is the seisin and possession of the others, and therefore contend that the seisin and possession of John A. Howe and of the defendants was not adverse. If the agreement among the children of Mrs. and Mr. Howe to give the land to their mother was effectual, then they are not tenants in common. True, they make no conveyance or written promise to convey to their mother, but did agree that an adverse title—a tax title—should be permitted to accrue to John A. Howe, which he was to convey to their mother, and thereby invest her with her ownership of the land. If John A. Howe had conveyed to his mother after he acquired the tax title, these heirs could not well question her ownership. He did not convey, because of the subsequent agreement between him and his mother that he should keep the land. It is quite clear, we think, that the children

of Morris Howe, having thus agreed to part with their interest in this piece of land, were not, therefore, tenants in common. There is no doubt but that John A. Howe and these defendants have been in possession all these years under a claim of right based upon the foregoing facts, and we think it fairly appears from the circumstances that the plaintiffs, or those under whom they claim, knew that John A. Howe was claiming the land adversely to them. It may be true, as claimed, that Mrs. Howe furnished the money to buy the tax certificate, and that the tax deed is void because of an insufficient description; but the fact remains that the children of Morris Howe agreed that the land should go to their mother by means of a tax title, that that tax title was procured and that she agreed that John A. Howe should retain it. It is said that a tenant in common can not acquire a tax title as against his cotenants. That rule does not apply in the face of such agreement as we find to have been made in this case. It is unnecessary that we discuss the facts further. Our conclusion is that, by the agreement to give their interest in the land to their mother, the children of Morris Howe parted with that interest, and that the possession of John A. Howe, and of the defendants under him, was open, notorious, and adverse, and known to the plaintiffs, or to those under whom they claim, to have been so. The decree of the district court is **AFFIRMED**.

MINNIE HALL v. THE INCORPORATED TOWN OF MANSON,
IOWA, Appellant.

Personal Injury: Damages. An instruction which allows damages for mental suffering which includes peril, and also for peril as a distinct element, is erroneous. (6)

SAME. Peril preceding injury, of which peril plaintiff is at the time ignorant, is an improper element of damages. (6)

Same: Earnings of Wife. A wife can not recover for a lessening of her capacity to perform the duties of a housewife. (7)

90	585
99	588
99	801
99	700
90	585
108	549
90	585
108	223
90	585
115	185
115	508
90	585
116	620
90	585
126	30
90	585
128	214
128	245
90	585
136	254

Instruction: Degree of Care. Instructions construed, and held, with others, to charge properly, that the duty of a town was to make its crossings reasonably safe for travelers. (3)

SAME. Instruction construed, and held to charge properly, that plaintiff's duty was to use ordinary care at all times, but that there might be a difference in what amounted to ordinary care in daytime and what in nighttime. (4)

Error Without Prejudice: Instructions. An instruction may assume the existence of undisputed facts. (4)

SAME: FAILURE TO INSTRUCT: PRACTICE ON APPEAL. The objection that there was an omission to charge on an essential point, can not be raised for the first time in this court. (5)

Appeal from Calhoun District Court.—HON. GEORGE W. PAINE, Judge.

SATURDAY, MAY 12, 1894.

ACTION for damages resulting from personal injuries. Trial to jury. Verdict for plaintiff. Defendant appeals.—*Reversed.*

E. A. Walton and Stevenson & Lavender for appellant.

Botsford, Healy & Healy for appellee.

KINNE, J.—I. In 1891 the defendant town, for the purpose of laying its mains for water, had excavated a ditch about six feet deep on and along Second street, and near the north side thereof, which excavation extended across Main street in said town. There was a crossing on the west side of Main street extending over said Second street, and said excavation came up to the sides of said crossing near the north side of Second street. This sidewalk crossing was three feet wide. The excavation spoken of had existed for some weeks prior to the occurrence of the injury in question. A water pipe had been laid in the bottom of the ditch, but the ditch had not been filled, prior to the accident. On the evening of October 20, 1891, plaintiff and

another lady undertook to pass over said Second street on the crossing before mentioned, and in doing so, plaintiff fell into the excavation, and suffered the injury for which she now seeks to recover. It is claimed on part of plaintiff that in attempting to cross the street she was in the exercise of due care, and that the night was dark; that there was no light or signal to warn her of the excavation, nor any barriers to prevent her from falling into it; that she was unable to discover the limits of the crossing by reason of the darkness; that she had no knowledge of the existence of the excavation, and that the defendant was negligent in not erecting barriers to prevent pedestrians from falling into the excavation, and in failing to place a light or signal thereat. The defendant admitted its incorporation, and that plaintiff's claim had not been paid, and denied all the other allegations of the petition. There was a verdict for three thousand dollars for plaintiff.

II. Very many errors are assigned and argued, some of them arising upon the admission and rejection of evidence. As, for errors in the giving of instructions, the case must be reversed, we need not consider the errors above referred to; for on another trial the same questions are not likely to arise. Nor, in view of our disposition of the case, would it be proper for us to pass upon the sufficiency of the evidence to support the finding of the jury, as it may be materially different on another trial.

III. It is urged that the court erred in giving the second instruction. In this instruction the jury is told that defendant is bound to keep its streets, sidewalks and crossings in a *safe* condition for public travel. In the third, fourth, and seventh instructions the jury was properly told, in substance, that it was the defendant's duty to use ordinary care and skill to make its streets and crossings reasonably safe for the use of travelers; and in the third instruction it was

told that defendant was not obliged to keep the crossing absolutely safe. Considering all of these charges together, we do not think it can be justly claimed that the jury was misled to the defendant's prejudice. We think it may fairly be presumed from the entire charge that the jury would understand that the duty of defendant went only to the extent of using ordinary care in keeping its crossings in a reasonably safe condition for the use of travelers.

IV. Complaint is made of the sixth instruction given by the court. It is as follows: "The plaintiff was on her part held to the exercise of ordinary care, but she was not bound to a greater degree of care in the nighttime than in the daytime. And in determining this question you are to take into consideration the place where it happened, the time of night, the construction and width of the crossing, and the declarations of the plaintiff at or immediately after the injury happened, in reference thereto, if you find she made any such declarations, and all the other circumstances in evidence surrounding the transaction. The same degree of care is to be used at all times, but greater caution or watchfulness should be exercised at night than in the daytime." This instruction is criticised by counsel, *first*, as assuming that plaintiff had in fact received the injury; *second*, because it directed the jury to consider, as bearing on the question of negligence, the construction and width of the crossing; *third*, because it was uncertain, misleading, and inconsistent. It is true that by the pleadings the fact of injury was denied by defendant, and hence may be said to be a question for determination by the jury, under the evidence.

We fail, however, to find any conflict whatever in the evidence touching the fact that plaintiff was in fact injured by falling into the excavation. There is nothing to show that the injury was received at any other time, or in any other manner. If it be conceded that

the instruction is open to the charge that it assumes that the accident occurred by reason of plaintiff's falling into the ditch, still it could work no prejudice to defendant, as all of the evidence shows that such was the fact. Under such circumstances it is not error for the court in an instruction to assume the existence of a fact about which there is no conflict in the evidence, and which fact is fully established by the evidence. *Russ v. The War Eagle*, 14 Iowa, 363; *Hughes v. Monty*, 24 Iowa, 499; *State v. Meshek*, 61 Iowa, 316, 16 N. W. Rep. 143; *Wood v. Porter*, 56 Iowa, 161, 9 N. W. Rep. 113. We see no error in that part of the charge which directs the jury to take into consideration all the circumstances surrounding the accident, including the construction and width of the crossing, in determining as to whether or not plaintiff was in the exercise of ordinary care. In any event, no prejudice could have resulted to defendant from this direction of the court. Nor do we think that the claim that the instruction was misleading, uncertain, and inconsistent is well founded. It may be conceded that the thought which the court undertook to express as to the degree of care required of the plaintiff was not happily stated, and not as clearly as it might have been. By the instruction the jury was told, in substance, that the same degree of care was to be used at all times, but that greater caution or watchfulness might be required at night than in the daytime. This rule is held in *Stier v. City of Oska-loosa*, 41 Iowa, 357. Now, the degree of care in such a case is ordinary care, whether the accident occurs in the daytime or nighttime. What will constitute ordinary care, however, will depend upon circumstances, and these may well include a consideration of the fact as to whether the accident occurred in the daytime or nighttime; and, if at night, it might be that more caution and watchfulness would be required to be shown

in order to establish the fact that the plaintiff was, in fact, at the time of the injury, in the exercise of ordinary care. In either case the degree is the same,—ordinary care—but the facts establishing such a degree of care may be different. As we have indicated, the instruction is not happily worded, but still we do not think it is justly open to the criticism made.

V. It is said that the court, in its charge, fails to instruct the jury touching the matter of notice to the defendant, of the excavation. It is true that the jury was not advised by the instructions as to the fact that the defendant, in order to be held liable, must have had actual notice of the defect, and an opportunity thereafter to remedy it prior to the accident complained of, or that it must have existed for such a length of time prior to the accident and have been so obvious, as that it may be presumed that the defendant had knowledge of it, and an opportunity to remedy it. The jury should have been fully instructed as to all the elements essential to plaintiff's recovery, and this would include this matter of notice. No instruction was asked by the defendant upon this branch of the case. While it is a general rule that a case will not be reversed for a failure to instruct on some point upon which an instruction would have been proper, and while in such cases it is usually incumbent on the complaining party to ask an instruction, yet such is not the invariable rule, especially in cases wherein the omitted instruction is essential to a full and proper submission of the case and necessary for the proper guidance of the jury. But we are not called upon to decide whether the failure to thus instruct on the question of notice was reversible error in this case, as we do not find that this question was presented to the court below. For aught that appears, it is made for the first time in this court, and under such circumstances, we can not pass upon it.

VI. In the eleventh instruction the jury was told that, if they found for plaintiff, in assessing her damages, they might take into consideration, among other things, what would compensate her "for the peril, if any, that the jury may find that she was subjected to, from the evidence in this case." It is insisted that in this respect the instruction was erroneous. "Peril," is defined by Webster as "instant or impending danger; risk; hazard; jeopardy; exposure to injury, loss, or destruction." Another definition is, "To expose to danger; to hazard; to risk; to jeopard." And still another is, "To be in danger." Without determining whether damages can be recovered for the peril one is in after he is conscious that an injury is impending and unavoidable, and prior to the actual infliction of the injury, we conclude that for other reasons the instruction, as given, was erroneous. It is somewhat lengthy, and we can not set it out in full, but the phraseology of it is such that it may fairly be said to be open to the construction that the peril spoken of might be such as would ensue as a result of the injury. The instruction is not limited to the peril incident to the time the plaintiff was falling into the excavation, and when she knew, or might perhaps be put in fear, of physical injury as a result of the fall. If the peril spoken of related to a time anterior to her fall, it certainly was not a proper element of damages, for, as she testifies, she did not know of the existence of the excavation prior to stepping into it. It follows she could not, prior to that time, have been conscious of danger. In one sense any one might be said to be in peril,—that is, subjected to possible danger and risk, who chanced to cross the street where this excavation was, even though he did not fall into it. But damages are not to be allowed for a risk to one who is not conscious of the impending danger, and when no physical injury is sustained. *Railway Co. v. McGinnis*, 26

Pac. Rep. (Kan.) 453. It is said that no prejudice could result, because peril is included in mental pain and suffering, for which the court properly told the jury plaintiff might recover. It is a sufficient answer to this that the instruction was not so worded as to imply that the peril referred to was included in mental pain and suffering. The jury was, by the instruction, given to understand that peril was a distinct, independent, and additional element of damages, for which recovery could be had; an element in addition to all the other elements of damage set forth in the instruction. In our view of the instruction, its wording would warrant the jury in allowing damages for mental pain and suffering, which would include peril, and also for peril as a distinct, independent, and additional element of damage, thereby allowing double compensation for the peril that plaintiff was in, which would be erroneous. See *Railway Co. v. Brunker*, 26 N. E. Rep. (Ind. Sup.) 178.

VII. In the eleventh instruction the court also told the jury: "And in assessing the plaintiff's damages, if a permanent injury has been proven from the evidence, the jury may take into consideration the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders the plaintiff less capable of attending to her ordinary duties than she would have been if the injury had not been received." The same thought is expressed in the twelfth and thirteenth instructions in somewhat different language. The evidence is that plaintiff is a married woman; that as such her duties are that of a wife keeping house for her husband. Being such, and not engaged in business on her own account, recovery for loss of her services could be had only by the husband. It is said in *Van Doran v. Marden*, 48 Iowa, 188: "We know of no legislation which changes the relations of husband

and wife so as to give the headship of the family in any case to the wife. He is still bound for her support, and entitled to her earnings, when she is not engaged in business on her own account." In *Tuttle v. Railway Co.*, 42 Iowa, 521, the court said: "The plaintiff in the case before us was engaged in no other than domestic services as the maternal head of the husband's family. Whatever time she lost or would lose would have been devoted to his employment, and the loss was her husband's for which she had no right to recover. If we admit her right to recover, defendant would be twice liable, for assuredly, under the rules of law, the husband may recover for such losses as were sustained by her." In *Fleming v. Town of Shenandoah*, 67 Iowa, 508, 25 N. W. Rep. 752, it is said: "She can not recover for loss of time occasioned by an injury, if her occupation is that of a mere housewife in the family of her husband." See, also, *Mewhirter v. Hatten*, 42 Iowa, 288; *Grant v. Green*, 41 Iowa, 88; *Lyle v. Gray*, 47 Iowa, 153; *Nichols v. Railway Co.*, 68 Iowa, 736, 28 N. W. Rep. 44. Under the rule as laid down in the above cases it is clear that plaintiff could not recover damages by reason of having by the injury been rendered less capable of attending to her ordinary duties as a housewife. As for loss of her services, the husband alone could recover, so for a partial loss of such services, resulting from her impaired ability by reason of the injury, he only can recover. For the reasons given, the case must be REVERSED.

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•100 377

STATE OF IOWA, Appellant, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY; SAME v. CHICAGO & NORTHWESTERN RAILWAY COMPANY; SAME v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY; SAME v. CHICAGO, RHODE ISLAND & PACIFIC RAILWAY COMPANY; SAME v. SIOUX CITY & ST. PAUL RAILWAY COMPANY.

Railroad Commission: Authority to Make Joint Rates: The statute authorizing railroads to establish a tariff of joint through rates, to be filed with the commission, does not authorize the commission to establish such rates. Chapter 28, Acts Twenty-second General Assembly. (3)

Joint Rate, Defined: A rate for shipment over more than one road is a joint rate, though the order fix the part which each road shall charge. (3)

SAME: NOTICE OF INTENTION TO FIX, ESSENTIAL. A joint rate ordered by the commissioners under section 3, chapter 17, Acts Twenty-third General Assembly, and section 17, chapter 28, Acts Twenty-second General Assembly, is not binding, unless notice of intention to fix such rate is given as provided in said acts. (3)

Party Plaintiff: Actions by the commission to enforce its orders must be brought in the name of the state. (2) DEEMER, J., took no part.

Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

MONDAY, MAY 14, 1894.

ACTIONS in equity for the enforcement of a certain order made by the board of railroad commissioners of Iowa. Demurrers to petitions sustained; and plaintiff electing to stand upon its pleading, and refusing to plead further, its petitions in each case were dismissed at its costs. From these rulings and judgments, plaintiff appeals.—*Affirmed.*

John Y. Stone, Attorney General, and T. C. Dawson for the state.

J. W. Blythe, N. M. Hubbard, T. S. Wright, John T. Fish, Wright & Baldwin and Smith McPherson for appellees.

KINNE, J.—I. In February, 1891, separate petitions in equity were filed in the Pottawattamie district court by the attorney general, at the instance of the board of railroad commissioners of the state, and in their name, as such commissioners, against each of the defendants, which said petition, as finally amended averred, in substance: That plaintiffs were railroad commissioners of the state of Iowa. That defendant was and is a railway corporation and common carrier owning and operating a railroad in this state. That its line of railway in Iowa is intersected or joined by the lines of other railways; and it is necessary, proper and convenient, in facilitating transportation, for freight to be shipped over both lines, for which purpose a transfer of freight from one line to the other at the place of intersection is necessary. That in conformity with chapter 28, Acts Twenty-second General Assembly, the said board, during the year 1888, made for the railway companies of this state, including the defendants, a schedule of reasonable maximum rates of charges for transportation of freight and cars. That before fixing said rates under section 17, chapter 28, Acts Twenty-second General Assembly, said commissioners published notice, as required, and fixed a time and place, when and where they would proceed to fix and determine said rates; the place being the office of the commissioners, at the capitol, in Des Moines, and the time being the ——— day of June, 1888, and less than sixty days before said act took effect. That at said time and place the commissioners afforded all firms, persons, corporations, and common carriers an opportunity to be heard. That after making such maximum rates they caused notice to be given as required by law. That on October 9, 1890, said original schedule of rates was so revised and modified that there was in force in Iowa, as the maximum rates adopted, fixed, and established by said commissioners, the rates adopted in June, 1888, and on October 9,

1890. That on making said revision they caused notice to be published for two consecutive weeks in a public newspaper in the city of Des Moines, in this state, stating the date of the taking effect of said rates. That, prior to the promulgation of the order hereafter referred to, persons interested demanded and requested of the railway companies doing business in this state, including the defendant, to establish reasonable joint through rates for the transportation of freight between points on their respective lines within the state, and to receive and transport freight and cars over such roads as the shippers might direct. That said companies and defendant have failed and refused, on said demand, and before the promulgation of said order, to establish through joint rates, or to establish and charge reasonable rates for such through shipments. That persons interested did make application to the board of railroad commissioners to establish joint rates, and upon such application said board did on July 31, 1890, formulate and fix the following reasonable schedule, and give the following notification thereof: "July 31, 1890, the commissioners made the following ruling, to apply to all shipments of freight, of any kind whatsoever, originating and terminating within the state, under the commissioner's schedule of reasonable maximum freight rates heretofore established, or that may be hereafter established: Iowa Freight Rates. Revised Schedule of Reasonable Maximum Rates for the Transportation of Freight within the state of Iowa. Notice is hereby given that in pursuance of the Acts of the Twenty-second General Assembly of the state of Iowa, and of the Acts of the Twenty-third General Assembly of the state of Iowa, the schedule of reasonable maximum rates of charges for the transportation of freight within the state of Iowa now in effect on the respective lines of railway of said state have been revised and amended by the adoption of the following:

From and after the fifteenth day of August, 1890, the following railroad companies engaged in the business of common carriers, and doing business within the state of Iowa (here follow names of all railroad companies in Iowa), shall be governed by the following rule in making rates for freight passing over two or more lines within the state: The maximum rate of freight to be charged by any railroad company receiving business from a shipper at a station on its line within the state of Iowa, destined to a point within the state of Iowa on another line of railroad, or receiving freight originating within the state of Iowa on the line of another railroad, and destined to a point within the state of Iowa on its line, shall be eighty per cent. of the Iowa tariff rate, which becomes effective August 1, 1890. * * * The rates fixed by the commissioners, June 18, 1890, are hereby revoked." That printed copies of the above order and schedule were sent to and received by all railway companies doing business in this state upon August 4, 1890. That the application and said notification were made after said joint rates were promulgated. August 22, 1890, the following notice was sent to all railroads doing business in Iowa: "On July 31, 1890, a revised schedule of rates was issued from this office, applying to Iowa freight received from or delivered to another line of railway. Such schedule became effective on the fifteenth instant; due notice of the same having been given as required by law, and a copy of which schedule, order, and notice is inclosed herewith. Up to this date, no information has been received at this office as to whether it is your intention to comply with the rates so established. Your attention is again directed to this matter, and you are called upon to obey said order of the commissioners, and to immediately put in force said schedule. Will you advise the commissioners, within ten days from the date hereof, as to whether

you are applying this schedule to the business of your line?" That said railroads did not agree upon a division of charges among themselves, nor did they put into effect said schedule. That, on October 9, 1890, the defendant and all other railroad companies in the state having failed to establish joint through rates, said board made and promulgated an order in the same form as is heretofore set out. That said order was published as required by law. That said companies, including defendant, refuse to comply therewith. That said order, and the rates provided therein, are just, reasonable and lawful. The second count sets out, largely, the same facts, and bases the order made on power claimed to have been given under Acts of the Twenty-second General Assembly, chapter 28, and section 1, chapter 17, Acts of the Twenty-third General Assembly. The prayer is that a decree be entered declaring said order, the rates established thereby, and the schedule of maximum rates, as modified thereby, to be just and reasonable, and that a mandatory injunction issue, compelling obedience to and compliance with said order. April, 1, 1893, the state was substituted in each case as plaintiff. Each of the defendants demurred for many reasons, averring that the facts stated did not show that plaintiff was entitled to the relief prayed; that the state was not the proper party plaintiff; that there was a defect of parties defendant; that the court had no jurisdiction of the subject of the action; that no notice was given of the promulgation of the rates in question, as required by law; that said board did not fix joint rates for the several companies forming a through line; that no notice was given of the intention to make such order, nor any application made therefor; that reasonable time was not given defendant, after said rates were promulgated, to agree upon a division of charges, but in the first instance a division was made of a through rate, allotting to de-

defendant a portion thereof, contrary to law; that there is no allegation that any demand was ever made upon defendant to put in rates for the transportation of freight delivered to it at a station on its line, and destined to a station on the line of another road; that the exclusive remedy for the wrongs complained of is provided by chapter 17, Acts of the Twenty-third General Assembly, and the board did not proceed in conformity therewith; that the order made is not enforceable in equity; that the law and order impair the obligation of contracts, and are in violation of section 10, article 1, of the constitution of the United States, and of section 21, article 1, of the constitution of the state of Iowa; that said act and order are in violation of sections 9 and 18, article 1, of the constitution of the state of Iowa, and of article 14 of amendments to the constitution of the United States, in that they seek to compel defendant to enter into contractual obligations with other companies against its will, without due process of law, and without just compensation, and in other respects; that there is no allegation in the petition that the commissioners ever fixed a joint rate for shipment over defendant's line, and any line connected therewith; that the schedule sought to be enforced fixes for defendant a lower rate for identically the same service than is fixed in the schedule claimed to be a schedule of reasonable rates; that the schedule is discriminative; that the act confers judicial powers on the commissioners, contrary to law; that it is an attempt to regulate commerce between states, and is void. The court sustained the demurrers; and plaintiff electing to stand upon its pleadings, and, refusing to further plead, the petitions were dismissed at its cost.

II. It is contended that the state is not the proper party plaintiff; that the action should be prosecuted in the name of the commissioners. In answer to this

claim, it may be said that the ruling in the case of *Smith v. Railway Co.*, 86 Iowa, 202, 53 N. W. Rep. 128, was intended to settle the practice in all cases instituted by the board of railroad commissioners to enforce orders and rulings made by them, and we see no good reason for making a distinction between that case and those at bar.

III. Some preliminary questions, which do not involve the validity of the law, are raised, which must be determined at the outset, and which, to our minds, are decisive of these cases:

First, it is conceded that no notice of an intention to fix these rates was ever given by the railway commissioners to defendants. On the part of the state, it is contended that the schedule of rates in controversy is but a revision of the schedule of reasonable maximum rates fixed and promulgated in 1888, so that no such notice was necessary. The defendants contend that the schedule of 1890 is in no sense a revision of the schedule of 1888, but an independent and original schedule. If the latter claim is correct, it seems to be conceded, and is undoubtedly true, that the giving of notice of an intention to fix such rates, in advance of making them, was a requirement of the law absolutely necessary to be complied with, in order to confer jurisdiction on the board to fix the rates in controversy. It will be observed that one count of the petition is based on the thought that under the act of 1888, and the first section of the act of 1890, the commissioners had power to establish joint rates, and that the schedule in controversy was made without regard to, and not by virtue of, the subsequent provisions of the act of 1890. If a joint rate could be established under the act of 1888, as seems to have been attempted, then the failure to give notice is justified by the fact that that act only required such notice when the original schedule was made, not of a revision thereof; and if

the schedule in controversy is merely a revision of that of 1888, made by virtue of the power given in said act, the objection that no notice of an intention to make it was given would not be well taken. The determination of the question, then, as to whether notice of an intention to fix the rates and make the schedule in question was an act essential to confer jurisdiction on the board to make it, involves a finding as to the power of the board to make a joint rate under the act of 1888. The act of 1888 provides only for the fixing of single rates for each road, while the act of 1890 makes provision for the establishment of joint rates applicable to two or more lines of road. There is nothing in the act of 1888, chapter 28, touching joint rates, except the following provision in section 7 of that act: "And in cases where passengers and freight pass over continuous lines or routes in this state operated by more than one common carrier and the several common carriers operating such lines or routes, have established joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said commissioners," etc. This section contemplates that such joint rates may be agreed upon by the railway companies, and in such case provision is made for the commissioners to make publication thereof. Nowhere in that act is any power conferred to make joint rates. But it is claimed that such power is conferred by the first section of the act of 1890, in connection with the act of 1888. We are unable to see that the first section of the act of 1890 confers any new or additional powers upon the board of railway commissioners. That section reads: "That chapter 28 of the Acts of the Twenty-Second General Assembly be and the same hereby is amended as follows: That said chapter 28 of the Acts of the Twenty-Second General Assembly shall not be construed to prohibit the making of rates by two or more railroad companies for

the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state, shall not be considered a violation of said chapter 28 of the Act of the Twenty-Second General Assembly, and shall not render such railroad company liable to any of the penalties of said act, but the provisions of the section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter 28 of the Acts of the Twenty-Second General Assembly."

Now, it will be seen that this section in no way relates or refers to the railway commissioners, nor does it increase or diminish their powers. It simply provides that the companies may by agreement make a joint through rate over two or more lines, and each charge therefor a less sum than is charged for a like shipment for the same distance wholly over its own line within the state. It follows, then, if the power to establish a joint rate exists at all outside of the provisions of the subsequent section of the act of 1890, it must be by virtue of the act of 1888 alone. It is said by the attorney general, in his argument: "The latter sections of the act of 1890 give to the commissioners the power, perhaps, to make such a through, continuous rate. This power, if it exists, has, however, not been attempted to be exercised. * * * The first section only amends the law of 1888 in respect of discrimination. The latter sections confer the power to adopt a new method of procedure to obtain an object which can also be attained under the powers previously existing." The argument,

then, is that the order is so made as that it does not prescribe a joint rate, but an independent rate for each road; hence, it was properly made, under the Acts of 1888, without notice, being a mere revision of the schedule made in 1888. We do not think this claim is well founded. A rate fixed to govern two or more roads, as to a shipment which passes over all of them, while in one sense a separate rate as to each, in that it fixes the rate at a certain per cent. of what each might charge for a like shipment for the same distance wholly over its own line, is nevertheless, in legal effect, a joint rate, and must be treated as such. It is said in *Railway Co. v. Dey*, 82 Iowa, 312, 48 N. W. Rep. 98: "And it is equally plain that the joint rates of charges cover all the charges for the transportation over two or more roads, as though they constituted one road, the rates fixed determining the whole charges. It is also plain that these joint rates consist of the separate rates of each separate road."

Now, the rate fixed by the schedule in question was for a through shipment over two or more lines of road. That the form of the order provided that each road constituting the one line should only charge eighty per cent. of a certain other rate for the same kind of traffic did not make the rate any the less a joint rate, because the rate and schedule in question applied only to through joint shipments; and a rate applicable only to a continuous shipment over two or more lines of road must, of necessity, be a joint rate, no matter what the form of phraseology of the order fixing it may be. Any other holding would result in authorizing the railroad commissioners to establish, promulgate, and have in effect, at the same time, and applicable to the same road, two different schedules of rates for the same identical service. Suppose two or more railroad companies mutually agreed that, for all through shipments over their respective lines, each company should have,

as its proportion of the entire charge, eighty per cent. of what it might lawfully charge for a like shipment for the same distance wholly over its own line. Could there be any question that a shipment made over such lines, and under such circumstances, would be a joint through shipment, and the rate a joint through rate, regardless of the plan by which division between the several roads of the entire sum to be charged should be made? The law expressly provides for just such agreements. Then why is such a rate, if made by the commissioners, any the less a joint rate than it would have been if entered into voluntarily by the interested companies? The character of the rate in controversy, as to being a joint rate or a local rate, must be determined from the shipment it is applicable to; and, if to a shipment which is to be continuous over two or more lines of road—that is, a through shipment—that fact fixes its character as a joint rate. The law did not intend that the commissioners might fix in the first instance a rate for each road which should be *prima facie* evidence of a reasonable maximum rate, and thereafter, without setting aside such rate, fix another less rate for the same service, and over the same road, which should also be *prima facie* evidence of a reasonable maximum rate therefor. The statute, as we have seen, authorizes the several companies to agree upon joint rates. The authority thus granted them is not to make rates independent of each other, and having no relation to another line of railway, and at a less rate than is charged over its own line of railway for the same service, but the rates are to be joint rates over two or more lines of road. Now, the eighty per cent. which the commissioners' order authorizes each road to charge simply determines its proportion of a joint rate, not a local rate; and the order itself is a joint rate order, applicable, as we have seen, to continuous, through shipments over two or more lines of road. By

the act of 1890 (section 3, ch. 17) it is provided that the board, in making joint rates, "shall be governed, as near as may be, by all the provisions of chapter 28, Acts of the Twenty-second General Assembly." In section 17 of said chapter, it is provided "that, before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers published in Des Moines setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place as soon as practicable afford to any person, firm, corporation or common carrier who may desire it, an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates and classification." Now, clearly, the rate in controversy, being, as we hold, a joint rate, and not a revision of the schedule of 1888, is an original rate, independent of the rate fixed in 1888; and the board have no power to fix and adopt the same without giving the notice provided by law, applicable to an original rate. No such notice was given. The giving of the notice is jurisdictional, and hence the rate fixed without it is not binding—is, in fact, of no validity whatever.

IV. Many other questions are elaborately discussed by counsel. As, however, for the reason heretofore given, the judgments below must be affirmed, and the same questions may not arise on another trial, we need not discuss them. Without determining whether there is a defect of parties defendant, it may be said that the question may not be free from doubt. **AFFIRMED.**

DEEMER, J., took no part.

80	806
85	732
90	606
97	710

ISABEL RICHARDS, Appellant, v. S. J. RICHARDS *et al.*

Will: Election by Widow: Refusal to Take Under Will. A will giving the widow a life use of the homestead does not bar her from also taking her distributive share, nor does filing a written refusal to take under the will. (2)

Will, Construed. Where a will permits a son to farm all land left under it, upon a certain rent, and gives the mother the right to lease it to others if he does not pay such rent, and also provides that the son shall have part of the land in fee, upon caring for the wants of his mother for life, he is entitled to such land in fee upon complying with that condition, but he must pay rent upon it during the life of the mother. (4)

Appeal from Greene District Court.—HON. GEORGE W. PAINE, Judge.

MONDAY, MAY 14, 1894.

THE plaintiff is the widow of Richard Richards, deceased, and the defendants are his children and heirs at law. This action was brought by the plaintiff for the purpose of procuring a decree by which her distributive share in certain land owned by the deceased should be set apart to her, and also to determine other rights which she claimed under the provisions of the last will and testament of her husband. The defendant, S. J. Richards, claimed that he was the equitable owner of part of the land, and that it was not burdened with a widow's distributive share. He also claimed that the plaintiff had no right in the estate based upon said will. A decree was entered which was favorable to the claims made by said defendant, and the plaintiff appeals.—*Modified.*

Russell & Toliver for appellant.

Perry D. Rose for appellee.

ROTHROCK, J.—I. It appears from the record that Richard Richards made his last will and testament on the fourth day of March, 1886, and he died in the month of November, 1889. At the time of his death he had the legal title to one hundred and twenty acres of land, which consisted of three forty acre tracts, according to government subdivisions. He had several children, all of whom were of adult age. None of them resided with him. He and his wife (the plaintiff herein) resided in a house on one of the forty acre tracts; and his son, the defendant, S. J. Richards, and his family, lived upon another of said tracts. That part of the will of Richard Richards which is material to this controversy is as follows: "*Second.* Should my wife survive me she shall, during her lifetime, have, for her sole benefit, the possession of the house and household goods, and all outbuildings that are attached to the premises that we occupy at the time of my decease. *Third.* That, inasmuch as my son, Stephen J. Richards, is working my farm on the shares, delivering one third of all the crops into my granaries on the premises occupied by me, and by agreement looking after me and my wife in sickness and health, hauling and delivering me my wood and coal, it is my further desire, should my wife survive me, and understood between me and Stephen Richards, that at my demise he is to work the farm for two thirds of the crops, to deliver the one third of all crops into the granaries designated by my wife, for her sole benefit during her lifetime; and, in case the said Stephen J. Richards should fail to work said farm as herein set forth, to look after her wants and to attend to her in sickness, or to move away, and not provide for her in sickness and want, then it shall be right for my wife to rent said farm during her lifetime, as she may seem best; and in case the said Stephen J. Richards complies with all the understanding as set forth above, then it is my desire that the said Stephen J.

Richards shall have for his share of my property, for his full benefit, the southwest quarter of the southeast quarter of section nineteen (19), town 84, range 32 west, Fifth P. M. of Iowa; otherwise he shall share equal with the rest, as I set forth, to wit, the one fifth.

Fourth. Inasmuch as I have already advanced to my son William W. Richards the sum of seven hundred and sixty-seven dollars, it is my desire that the above amount shall constitute his share, and that the said William W. Richards shall not receive one dollar more in the distribution of my property. *Fifth.* It is my desire that the northwest quarter of the southeast quarter, and the southeast quarter of the southeast quarter, of section number nineteen (19), town 84, range 32 west, Fifth P. M. of Iowa, be divided as follows, to wit: To Tabitha Powers and her heirs, the one fourth; to Amanda M. Morton and her heirs, the one fourth; to May Richards and her heirs, the one fourth; to Naomi J. Stanley and her heirs, the one fourth. The one fourth as set forth above shall be construed to mean the one fourth of said land, or the one fourth of the value of said land." The only real contest is between the plaintiff and the defendant S. J. Richards. The other devisees did not appeal from the decree of the district court, and must be regarded as consenting to its provisions.

The issue of fact made in the case was as to the right by which Stephen J. Richards was in possession of the forty acre tract upon which he resided, and which was devised to him by the will. He claimed that he was entitled to it under the will, but that his right thereto did not really depend upon the provisions of the will. He insisted that he had a full equitable ownership of the land by reason of an oral contract made between his father and himself several years before the death of the father. A large number of witnesses were introduced and examined to establish the alleged oral

agreement. We will not review the evidence of these witnesses. It is enough to say that a careful examination of the whole evidence satisfies us that the alleged contract was no more than an understanding between the father and son that the son was to have the said forty acre tract when the rents thereof should no longer be required for the support of the father and mother. There is no evidence in the cause which would have authorized a decree of specific performance against the testator in his lifetime. The evidence consists largely of just such declarations as a father would naturally make in reference to a final disposition of his property without any intention of making conveyances by deed. It is true that at times he stated that the defendant was to have the land when he (the father) was done with it, and again he declared that the transfer was not to be operative during the life of his wife. This latter view of the relation of the parties is strongly supported by the will itself, which was made more than three years before the death of the father.

II. Under this will, the widow was entitled to the provisions made for her by the will, and also to a distributive share of the estate as widow. There is nothing in the will inconsistent with the right to take under the will, and also the one third of the land under the law. *Metteer v. Wiley*, 34 Iowa, 214; *Potter v. Worley*, 57 Iowa, 66, 7 N. W. Rep. 685, and 10 N. W. Rep. 298; *Snyder v. Miller*, 67 Iowa, 265, 25 N. W. Rep. 240; *Daugherty v. Daugherty*, 69 Iowa, 679, 29 N. W. Rep. 778. It is true that a claim is made in the pleadings that the plaintiff has no right to take under the will, because, by a writing filed in the court below, she refused to accept the provisions of the will, and elected to take a distributive share of the estate under the law. That writing was filed some time before this action was commenced. There is no serious claim made in argument that the plaintiff, by filing this writing,

relinquished any right under the will. There is no legal requirement that such an election shall be made, and no right of the defendant, S. J. Richards, was in any manner prejudiced thereby. The statutory provision for a widow's election pertains to a consent to take under the will, and a relinquishment of her distributive share. Code, section 2452.

III. We have said that there is no evidence authorizing a decree in favor of the defendant, S. J. Richards, based upon the specific performance of a contract between himself and his father. But he is entitled, under the will, to the forty acre tract in controversy, provided he complies with the provisions of the will made for the benefit of his mother. Whether he did so comply from the time of his father's death to the commencement of the suit is a question of fact upon which evidence was introduced by the parties. There is no doubt in our minds that a preponderance of the evidence shows that for the years 1890 and 1891 the defendant farmed the land and delivered to his mother one third of the crops, in substantial compliance with the will, and that he was ready and willing at all times to "look after her wants." We incline to think that, if there had not been interference by others, this suit would not have been brought.

IV. Under the above facts, which we hold to be established by the evidence, the question to be determined is, what are the rights of the parties under the will? The district court found that the plaintiff, as widow, was entitled to the undivided one third of all the land, and that S. J. Richards was the owner of the forty-acre tract upon which he lived; and that the plaintiff's one third of the whole real estate should be set apart from the other two forty acre tracts; and that the plaintiff should have the rents of the residue of the real estate during her natural life, as given to her under the will; and that, if said S. J. Richards "declines

to work said land, and to deliver to her the one third of the crops raised annually thereon, then she, the said Isabel Richards, may rent the said land so remaining, and have, use, and hold as her own the rent thereof for and during her natural life." This decree as nearly follows the provisions of the will as a decree can be made, with one exception: It releases S. J. Richards from delivering the grain rent for the forty acres which are decreed to him. The testator evidently contemplated that there would be no litigation over his small estate. He supposed it would remain undivided during the life of his wife. The demand for the setting apart the distributive share to the plaintiff has made it impossible to carry out the exact provisions of the will; and the decree, as it stands, may be impossible to be performed. It may not be practicable to divide the two forty acres as provided by the decree, which requires one third to be set off to the widow and the balance divided among the other four devisees. If the referees can not divide the land, and it must be sold, then S. J. Richards can not be held liable for the rents therefor. But we discover nothing in the case which would release him from the rent of the forty acre tract devised to him by the will. The decree of the district court will be modified so that the defendant, S. J. Richards, will be required to deliver the grain rent from his land according to the will. He will be required to farm and deliver the rent on all of the other land, unless, in closing up the partition, the land be sold, in which case he is to be released from any obligation for rent on that part of the land. **MODIFIED AND AFFIRMED.**

GEORGE W. TOMS *et al.*, Appellants, v. ELIZABETH C.
BEEBE *et al.*

Attorney and Client: Confidential Communication. A statement made to a lawyer by one for whom he had drawn certain releases, and made after the releases were drawn, that they belonged to the grantee in them and that said grantee wished the lawyer to keep them in his safe, is not a confidential communication within Code, section 3643.

Appeal from Linn District Court.—HON. JAMES D.
GIFFEN, Judge.

MONDAY, MAY 14, 1894.

THE plaintiffs are the executors of Herman Foster, deceased, who died testate on the fifteenth day of January, 1892. The defendant, Elizabeth C. Beebe, on the fourth day of April, 1884, made her two notes to Samuel N. Goodhue for two hundred dollars each, and secured the same by mortgage on two lots in Marion, Iowa. On the tenth day of January, 1885, she made her promissory note to Herman Foster for three hundred dollars, and also secured it by mortgage on the same lots. The two notes to Goodhue were assigned to Foster during his lifetime. In June, 1891, Foster executed a release of each mortgage, and a few days after his death they were filed for record by Elizabeth C. Beebe. This action is to cancel the releases, as being executed without consideration, and obtained by undue influence, and to reinstate and foreclose the mortgages. The district court dismissed the petition, and the plaintiffs appeal.—*Affirmed.*

Davis & Voris and *Mills & Keeler* for appellants.

Milo P. Smith and *W. F. Fitzgerald* for appellees.

GRANGER, C. J.—Herman Foster, at the time of his death, was a man about eighty-three years of age, and he occupied a room in the house of Mrs. Beebe. J. M. Gray is a practicing attorney at Marion, Iowa, and was the attorney and legal adviser of Foster. The releases were executed in the office of Gray in June, 1891, and taken away by Foster. In a short time afterward, Foster brought them back, in a sealed envelope, which he handed to Gray without disclosing its contents, and said to Gray that it contained papers belonging to Mrs. Beebe, and that she wanted to know if he (Gray) would not keep them in his safe for her. Gray took the envelope, and marked Mrs. Beebe's name on the outside of it, and placed it in the safe. After Foster's death, Mrs. Beebe sent for the envelope, and Gray took and delivered it to her, and she sent the releases to the office for record. These facts are shown by the testimony of Gray, who also said that he wrote the body of the releases at the time of the execution, and that, when Foster brought back the releases, he brought, and left with Gray, his will, to be disposed of in case of his death, as the law directs. Mrs. Beebe testified that, soon after the releases were made, Foster had them at her house; that she had them in her hands, read them, and handed them back to Foster, who took them away.

There is an evident purpose, in taking this testimony of Mrs. Beebe, to avoid any statement by her of a conversation or transaction between her and Foster, because of the prohibition of Code, section 3639, but it is urged that even what she did say comes within the prohibition. Mrs. Beebe's claim is that the releases were made—*first*, because of Foster's occupancy of her

house, and her care and attention to him; and, *secondly*, as a gift. The testimony objected to would go only to the question of a delivery of the releases; and, disregarding that testimony, we think a delivery quite conclusively appears, unless the testimony of Mr. Gray comes within the statutory prohibition, and this is claimed on two grounds—*first*, under the provisions of section 3639; and, *second*, under section 3643. Clearly, the testimony is not incompetent under section 3639, and the point does not seem to be seriously urged. The other section (3643) is with reference to confidential communications to an attorney; and by that section he is prohibited from revealing them in evidence when “intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.” The execution of the releases is a conceded fact in the case, independent of the testimony of Mr. Gray. When they were taken to the office, and left, by Mr. Foster, the conversation with reference to the envelope and its contents was not of a professional or confidential character. Foster but stated to Gray a request or wish of Mrs. Beebe. It does not appear to have been a matter of his own concern. The language of the witness, after stating the directions as to the will, is: “The other, he said, was papers that belonged to Mrs. Beebe, and she wanted to know if I would keep them in my safe for her.” The testimony was clearly proper. From the statement, it appears that the papers then belonged to Mrs. Beebe; and the conclusion is that the requirements of the law had been observed, to make them hers, and that they had been intrusted to Foster to deliver to Gray. There is not a particle of testimony to overcome this plain admission of Foster, nor the necessary conclusion from both his words and acts. He stated that the releases were hers, and he left them in Gray’s possession as

hers. It is not important that we should inquire whether they were executed as a gift, or upon consideration. Either would be valid. There was nothing in his condition of age or infirmity to make him incompetent for such a transaction, and it appears that he felt for her a degree of gratitude, for providing for him comforts in his old age, that he felt for no others. The judgment of the district court is **AFFIRMED**.

REPORTS
OF
CASES AT LAW AND IN EQUITY,
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, JANUARY TERM, A. D. 1894.
AND IN THE FORTY-EIGHTH YEAR OF THE STATE.

SAMUEL AURANDT, Appellee, v. CHICAGO, MILWAUKEE,
& ST. PAUL RAILWAY COMPANY, Appellants.*

Railroads: NEGLIGENCE: EVIDENCE. A rule of the defendant required the foremen of section gangs, when any work was being done which would "render the track unsafe or impassable, or unsafe for trains at their usual rate of speed," to display signals at proper places to warn engineers of approaching trains that such work was being done. While the plaintiff was engaged, under the direction of a foreman of the defendant, in "surfacing" a bridge, he left the track to clear the way for an approaching train, but, through oversight, a spike maul was left on the track, was struck by the train, and so thrown against the plaintiff's arm as to break it. *Held*, that, as the work of "surfacing" made the track neither impassable nor dangerous, the court erred in submitting to the jury the question of the foreman's negligence in not displaying signals under the above rule. (1)

*This and seventeen cases following were reported by Hon. N. B. Raymond.

SAME: INSTRUCTIONS TO JURY. An instruction to the jury, in an action for personal injury, as to acts of negligence which are not made a ground for recovery under the allegations of the petition is erroneous. (2)

SAME. It is error to instruct a jury upon questions as to which no evidence has been introduced. (3)

Appeal from Linn Distric. Court.—HON. J. H. PRESTON,
Judge.

MONDAY, JANUARY 22, 1894.

ACTION to recover for injuries alleged to have been caused by negligence on the part of defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

Mills & Keeler for appellant.

Rickel, Crocker & Christie for appellee.

ROBINSON, J.—On the twenty-eighth day of April, 1890, the plaintiff was in the employment of defendant as a bridge carpenter, and was working on a bridge in its line of railway a short distance east of the station of Atkins. While so engaged, a stock train approached from the west. A warning was given to the men working on the bridge, and the plaintiff and others left it to clear the way for the train. Through oversight, a spike maul was left on the bridge, and was struck by the train, and was thrown a distance of forty or fifty feet against the right arm of plaintiff, which it broke, thus causing the injuries for which he seeks to recover. The petition alleges that the accident was caused by the negligence of the defendant in the following particulars: *First.* That Keller, the foreman who had charge of the workmen at the bridge, neglected his duty in not displaying, at a proper place, signals to warn engineers and other employees of approaching trains of the fact that work was being done on its track and bridge, so that the engineers and trainmen might give warning to

the men engaged in such work, and so control the train as to enable the men to remove their tools and leave the track, before the train should reach them. *Second.* That the defendant failed to run the train at a proper rate of speed and in accordance with its general rule, and failed to give proper signals of its approach, and negligently ran the train at the rate of from thirty-five to forty miles an hour, when it should have been run at the rate of but six miles an hour. *Third.* That the engineer of the train was negligent in not using the means at his command to slacken the speed of the train, and in failing to give sufficient warning of its approach.

I. The court submitted to the jury the questions of Keller's negligence in not displaying signals at a sufficient distance from the bridge to warn the engineers and trainmen of an approaching train that persons were working on the bridge, in order that signals of the approach of the train might have been given to the workmen in due time. In submitting that question we think the court erred. It is not shown that it was the duty of Keller to signal the engineer and trainmen. A rule of the defendant required that such signals be given "when any work is to be done which will render the track unsafe or impassable, or unsafe for trains at their usual rate of speed." But it is not shown that such a condition existed in this case. The work Keller and his men were engaged in doing was "surfacing" the bridge. A part of it was too low, and some of the stringers were raised by means of jackscrews, and pieces of boards less than an inch in thickness were placed under them. The work on the bridge did not make the track impassable, or even dangerous. It was not customary nor required by the rules of the defendant in such cases to signal approaching trains, nor to slacken their speed, but it was the duty of the workmen to clear the track for the trains. That was a usage well known to the plaintiff, who had been engaged in bridge work

for the defendant for more than a year at the time of the accident. Therefore, no negligence on the part of Keller was shown.

II. The court charged the jury as follows: "If you find from the testimony that at the time the plaintiff, Aurandt, received his injury, he was working under the immediate supervision and direction of a foreman having full control and management of the work in which he was engaged, invested with power to supervise and direct the operations of the servants under him, and with authority to employ or discharge them, then you are instructed that the said foreman was a vice principal, and, while working within the scope of his authority, his negligence, if any you so find, was the negligence of the defendant company; and if you further so find that the injury complained of was directly or proximately caused by the combined negligence of the said foreman and one of said Aurandt's coemployees engaged in working on the bridge, or by the sole negligence of the said foreman, and that said Aurandt was free from contributory negligence, then the plaintiff is entitled to recover, and your verdict will be for the plaintiff." The petition does not allege that the foreman was guilty of any negligence except in failing to signal approaching trains, and, as there was no evidence of negligence in that respect, there was no question of negligence in that or other matters, whether he acted alone or with another, to submit to the jury, and the paragraph quoted should not have been given.

III. The appellant complains of the ninth paragraph of the charge, which is as follows:

"If you are satisfied from the evidence that plaintiff did not use ordinary and reasonable care in gathering up the tools, and getting out of the way of said train, still this would not prevent a recovery by plaintiff if you further find from the evidence that, notwithstanding the said negligence of plaintiff, the engineer of said

train discovered, or by the exercise of ordinary and reasonable care upon his part should have discovered, the negligent situation and peril of plaintiff, and thereafter failed and neglected to use ordinary and reasonable care to make use of the means and appliances in his power, and under his control, to so run his engine and train as to prevent injury to the plaintiff; and if you so find that he so failed to use said care after such discovery, and by reason of such failure plaintiff sustained injury, then he will be entitled to recover."

This should not have been given. There was no evidence that the engineer discovered, or that by the exercise of ordinary and reasonable care he could have discovered, that the plaintiff was in peril when the train approached the bridge. It is not claimed that he should have seen the spike maul, and slackened the speed of the train on that account; and, so far as he could have observed as the train approached the bridge, the plaintiff had seen the train, and had placed himself in a place of safety beyond it, on one side of the track.

In view of the conclusions announced, it is unnecessary to determine other questions discussed by counsel. For the errors pointed out, the judgment of the district court is REVERSED.

MARY E. McCOLLISTER, Appellant, and ESTELLA
McFADDEN, Intervener, Appellee, v. LIZZIE
V. YARD *et al.*, Appellants.

Title to Real Estate: ACTION TO DETERMINE: BURDEN OF PROOF.

Where, in an action in equity against parties in possession of certain real estate under claim of ownership, the plaintiff claimed title to said property by descent, and asked that the title thereto, or of such portion thereof as the court might determine belonged to her, be confirmed in her, *held*, that the burden was upon the plaintiff to establish such facts as entitled her to the relief prayed. (1)

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SAME. DESCENT: RIGHTS OF ADOPTED CHILD: ARTICLES RECORDED AFTER MAJORITY Where articles for the adoption of a minor child were not filed for record with the county recorder until after the child attained her majority, though in the lifetime of the adopting parent, *held*, that the child was not entitled to take by inheritance from the adopting parent, under the provisions of section 2310 of the Code, giving to adopted children "upon the execution, acknowledgment and filing for record," of the articles of adoption, the same right of inheritance as exists in favor of children born in lawful wedlock. (2)

Evidence of Lost Writing: FOUNDATION REQUIRED FOR INTRODUCTION OF SECONDARY EVIDENCE. Where, in an action by a guardian in behalf of his ward, the guardian testified that he had seen certain articles of adoption pertaining to the ward, and had ordered them filed by a firm of attorneys named, but that he did not have them in his possession, and did not know where they were, and no effort was made to show that the articles were not in the possession nor under the control of the ward, *held*, that sufficient foundation had not been laid for proof of the articles by the introduction of the record thereof in the office of the county recorder. Such articles are an instrument affecting real estate within the meaning of sections 3659 and 3660 of the Code; nor are they a paper "belonging to any public office, or by authority of law filed to be kept therein," the record of which would be admissible as original evidence under section 3702 of the Code. (3)

Appeal from Johnson District Court.—HON. S. H. FAIRALL, Judge.

MONDAY, JANUARY 22, 1894.

ACTION for the recovery of certain real estate, together with the rents and profits thereof. Estella McFadden intervened. From a decree in favor of the intervener, and against the plaintiff, the plaintiff and defendants appeal.—*Upon the plaintiff's appeal, affirmed; on the defendant's appeal, reversed.*

Baker & Ball for appellants.

Ranck & Wade for appellees.

KINNE, J.—This is an action in equity, brought by Mary E. McCollister, wherein she claims to be the owner of a large amount of real property, also certain

rents and profits arising therefrom, all of which the defendant Welch, as administrator, holds in his possession. During the pendency of the plaintiff's action, Estella McFadden (by her guardian) intervened therein, claiming said property. The cases were tried as one, and were heard before Hon. James D. Giffen, judge of the eighteenth district, as a referee, who found for the defendants in the case of McCollister v. Yard et al., and for the intervener in the case of McFadden v. Yard et al. Judgments and decrees were entered in accordance with said findings, from which the plaintiff and defendants respectively appeal.

As many facts are admitted, we will first set out the same, so far as applicable to the plaintiff's case: *First.* That on March 1, 1862, one Thomas Hill entered into a deed of adoption formally adopting the plaintiff; that said deed was delivered, and was on January 28, 1867, duly recorded; and it is conceded that the same is in all respects regular, but it was not recorded until after the plaintiff, by marriage, had reached her majority, but was recorded during the lifetime of the adopting parent. *Second.* Said Thomas Hill died testate June 1, 1885, seised of the real estate in controversy. *Third.* By his will, his wife, Eliza D. Hill, if she survived him, was to become the absolute owner of all his property, both real and personal. *Fourth.* Eliza D. Hill died intestate January 16, 1886, and in possession and enjoyment of all said estate of Thomas Hill. *Fifth.* Neither Thomas nor Eliza D. Hill had issue. *Sixth.* The parents of said Eliza D. Hill were Francis H. Doran and Maria Van Aken, and they died, respectively, in 1840 and 1846. *Seventh.* The parents of said Eliza had issue other than said Eliza, one daughter, who died without issue about 1846, and one son, who disappeared, unmarried, about 1837, and has never since been heard from, and had no issue. *Eighth.* The defendants are a brother of Maria Van Aken, who

was the mother of Eliza D. Hill, and the children and grandchildren of the remaining brothers and sisters of Maria Van Aken, and claim the estate of Eliza D. Hill as heirs of the mother, only, of Eliza D. Hill. *Ninth.* Francis H. Doran, father of Eliza D. Hill, has no heirs living.

The plaintiff claims the property by virtue of her adoption by Thomas Hill, and as his heir. The defendants claim the property as heirs of Eliza D. Hill, and deny that the estate passed to the heirs of said Thomas on the death of said Eliza. The defendants, in an answer to the plaintiff's petition, aver that, after the death of Thomas and Eliza D. Hill, the plaintiff began an action in the district court of Johnson county, Iowa, contesting the will of said Thomas Hill, on the ground that he was of unsound mind, and that said will was procured through undue influence, and was void; that, after issue had been joined therein by these defendants, the parties to said litigation entered into an agreement whereby all the claims which the plaintiff had against the estate of either Thomas or Eliza D. Hill were settled by a payment to her of one thousand dollars which she still retains; and they claim she is now estopped from claiming any portion of the property in controversy. In a cross bill they also set up their claim to the property as heirs of Eliza D. Hill, and ask that title be quieted in them. The plaintiff, in a reply, admits the beginning of the action to set aside the will, but denies that she settled all claims she had against the estate of Thomas and Eliza D. Hill; says she agreed that a decree might be entered in said case on the payment to her of one thousand dollars, and that was all the agreement she made; that the alleged contract of settlement pleaded was without consideration, and is void, and, if made at all, was made under a mistake of fact, and belief that the defendants were entitled to the entire estate of Eliza D. Hill, whereas

such was not the fact. The defendants amended their answer, alleging among other things, that the plaintiff was not a legal heir of Thomas Hill, that she was never legally adopted by him; that the articles of adoption were not filed for record until after her marriage, and when she had become an adult, and at a time when she was not subject to adoption under the law. To this amendment the plaintiff filed a reply, averring that by her marriage she did not become an adult, and that the filing of the articles of adoption, and record thereof, during the lifetime of Thomas Hill, was a compliance with the statute. She further claims that the defendants can not be heard to question her right to the property under said deed of adoption because they have no interest in the property claimed by her. On the trial, the defendants objected to the introduction of the deed of adoption because it appeared that it was recorded after the plaintiff was an adult, and because the deed was not signed by Eliza D. Hill.

The case of the intervener, McFadden: The intervener, McFadden, joins the plaintiff, and claims one half of the estate of Eliza D. Hill. She claims to have been legally adopted by Thomas Hill on July 1, 1882, by articles duly entered into and filed for record. When adopted, her name was Estella Welton, and she afterward lawfully took the name of McFadden. The facts admitted as to the plaintiff, and numbered from 2 to 9, inclusive, are also admitted in this case. Under these admitted facts, and by virtue of her adoption, she claims one half of the property in controversy. The defendants, as to her claim, say that as to whether the deed of adoption referred to was executed by the said Thomas Hill and Lizzie Welton, or as to whether the signatures of said parties thereto are genuine, or as to whether the same was ever delivered, the defendants have neither knowledge nor information sufficient to form a belief, and can not admit the same; deny that

by said instrument she became or was the heir of Thomas Hill, or became entitled to the rights or privileges of a child of the blood of said Thomas Hill; deny that she has any ownership in the property in controversy; and deny that she is entitled to same, or any part thereof. Some questions touching the admissibility of evidence in this case may be referred to hereafter. It is sufficient now to say that it is claimed that no legal and proper evidence of the intervener's adoption was shown, and that, even if adopted, the statute conferred no rights upon her, except those existing between her and the adopting parent.

I. It is said that the defendants have no such interest in the property in controversy as to entitle them to question the plaintiff's right thereto. The plaintiff avers in her petition that the defendants claim to own the property; that they are in possession of it; that the defendant Welch, as the administrator of Eliza D. Hill, deceased, by some arrangement with the other defendants, is in possession and control of the estate, and enjoying the rents thereof. Her prayer is that the title to the real estate be confirmed in her, "or such portion thereof as the court should find belonging to her," etc. Whatever this action may be called, it is a proceeding in equity, and its purpose is to ascertain and fix the extent of the plaintiff's interest in this property. The burden is on the plaintiff to establish such facts as entitle her to a judgment and decree; otherwise, she can not recover; and in this view it is not necessary for us to give further attention to this branch of the case.

II. The material question in this case, as concerns the plaintiff, is, was she legally adopted by Thomas Hill. The only question raised touching the adoption is that the instrument of adoption was not filed for record until after the plaintiff had attained her majority; hence it is contended that the adoption was never completed.

Our statute relating to adoption provides that any person competent to make a will may adopt "as his own the minor child of another, conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock." Code, section 2307. Section 2308 of the Code provides, in substance, that the consent of the parents, if living, must be obtained to an instrument in writing; that it must be signed by the party or parties consenting, and state the names of the parents if known, the name of the child if known, and the residence of all if known, and declaring the name by which such child is thereafter to be called and known, and stating that such child is given to the person adopting for the purpose of adoption as his own child. Sections 2309 and 2310 of the Code read as follows: "2309. Such instrument in writing shall be also signed by the person adopting, and shall be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged, and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the names of the parents by adoption as grantors, and the child as grantee, in its original name if stated in the instrument. 2310. Upon the execution, acknowledgment, and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exists by law between parent and child by lawful birth."

As we have said, the instrument of adoption in this case was not filed for record until after the plaintiff had attained her majority, but it was filed during the lifetime of Thomas Hill. In *Tyler v. Reynolds*, 53 Iowa, 146, the instrument of adoption was not filed for record until after the death of the adopting parent. It

was held that the right of inheritance "was a purely statutory right, and is therefore arbitrary, absolute and unconditional. Nevertheless, the provisions of the statute must prevail, although to do so, in some instances, is inconsistent with our views as to what constitutes natural rights, or justice and equity. Therefore, a child by adoption can not inherit from the parent by adoption, unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are that the written instrument must be executed, signed, acknowledged, and filed for record. When this is done, the act is complete. * * * No rights were acquired until this was done, and neither was bound until then." This case was followed in *Gill v. Sullivan*, 55 Iowa, 343. In that case the instrument was never filed because of its being almost destroyed by an accident. In *Shearer v. Weaver*, 56 Iowa, 578, the adoption paper was not filed until about a month after the death of the adopting parent. Following the previous cases, it was held that the adoption had not been completed. The case of *Fouts v. Pierce*, 64 Iowa, 71, was a proceeding by *habeas corpus* to determine the right of custody of a child. No question of inheritance was involved. When Mrs. Fouts was a widow, she entered into articles of adoption with the defendant as to her child Ella. These articles were not filed for record, or recorded, until April 10, 1883. Ella's mother married the plaintiff, and in February, 1883, executed other articles of adoption, making the plaintiff the adopted parent. These articles were filed for record on the day they were executed. In discussing the case, the court propounds certain questions, answers to which were not necessary to a decision of the case, and which were not answered, but which might leave an inference that the writer questioned the construction which had before that been placed upon the statute. The court has no doubt as to

the correctness of the holding in the cases heretofore referred to. It is true that the facts in the cited cases are not like those in the case at bar.

It will be observed that our statute makes provision only for the adoption of minors. Code, section 2307. Now, by the express terms of the statute, adoption is not completed until the instrument of adoption is executed, acknowledged, and filed for record. Until all these things are done, there is no adoption. It matters not that some of the requisites of the law are complied with, if others are ignored. A compliance with all is essential to fix the status of the parties as parent and child by adoption. Now, if, as we have seen, no one but a minor can be adopted, and if adoption can only be accomplished by the performance of certain acts, it follows that these acts must be performed, and the relations of the parties, as parent and child by adoption, fixed and established, during the period in which the subject of the adoption is capable, under the law, of being adopted. In other words, all the acts necessary to effect an adoption must be done during the minority of the child sought to be placed in this new legal relation. It seems to us that any other holding would not only be a clear departure from the requirements of the statute, but would, in effect, make the adoption of a child a matter largely resting in the court, without statutory restraint. Thus, if we say that an adoption is complete where the article, though executed during the minority of the child, is not filed until afterward, why may we not properly hold that it would also be effectual if the article of adoption related to one who, at the time it was entered into, was an adult? Now, when the article in this case was filed, when one of the steps essential to an adoption was taken, the plaintiff was in law an adult. She was not then capable of being adopted, under the statute. For five years she had ceased to be a subject of adoption.

No one, then, had a right to bind her by an article of that character, or to change her legal relations in that manner. Not then being capable of being adopted under the statute, acts relating thereto, which had been done when she was a proper subject for adoption, but which were incomplete, could not be completed, and thus rendered effectual, after she had attained her majority. After she had passed the period of minority, she was not within either the wording or spirit of the statute providing for the adoption of minors. We see no escape from the plain provisions of the law, and we discover nothing which would justify us in holding that, when the law provides that a minor may be adopted by complying with certain prerequisites, either the letter or spirit of the law is satisfied by the performance of some of the requirements after the subject of the adoption has ceased to be such a person as the statute renders capable of adoption. See *Long v. Hewitt*, 44 Iowa, 367.

Counsel for the plaintiff cite *Sewall v. Roberts*, 115 Mass. 262, and *Abney v. De Loach*, 84 Ala. 393; 4 S. Rep. 757. In the first case the probate court, on the petition of Roberts and wife, entered a decree permitting them to adopt the child, as provided by statute. No guardian *ad litem* was appointed to represent the child. The court, without determining as to whether such a guardian was necessary in such cases, held that if one was necessary, still, a failure to appoint one would not render the adoption invalid, but it would be avoidable only at the option of the child. The case did not involve the question here presented. In the Alabama case the statute required a declaration of adoption to be executed, acknowledged, and filed and recorded before the relation of parent and child by adoption was created, and the child made capable of inheriting. The paper was required to be filed in the office of the judge of probate, and recorded on the min-

utes of his court. The paper was properly executed, acknowledged, and filed, but the judge recorded it in a book kept by him for the record of deeds and wills. It was properly held that his failure to record it in the required book did not avoid the instrument. Clearly, that case is not authority in support of the plaintiff's contention in this case. There the claimed invalidity was based on the failure of a public officer to do his plain duty. No question arose as to the parties to the instrument having failed to properly deposit the paper in the judge's office. The distinction between the two cases is well marked. In the case at bar the parties to the instrument, who had the same in their possession or under their control, failed to discharge an absolute requirement imposed by law, in order that it might be effective as an article of adoption, while in the cited case the statutory requirement which was not complied with was a matter over which they had no control. The parties had done all that they could do, in fact all that the law required of them, and they could not be robbed of the benefit of their own acts by reason of the failure of a public official to discharge a duty imposed upon him by law. The court cites and distinguishes the Iowa cases from that one. The conclusion we have reached, that the plaintiff was never legally adopted, being an absolute bar to her recovery, we need not consider other questions discussed by counsel. The judgment and decree as to her in the district court were right.

INTERVENER MCFADDEN'S CASE.

III. The intervener, McFadden, was found by the referee to have been legally adopted about June 24, 1882, by Thomas Hill. This finding was approved by the district court, and counsel for the defendants insist that the finding is not warranted by the evidence. The petition of intervention sets out the instrument of adoption, with all proper averments as to its execution

and recording. The answer denies the execution of the instrument, denies the genuineness of the signatures thereto, denies its delivery, denies that by said instrument the intervener became or was entitled to the rights and privileges of a child of the blood of Thomas Hill, denies the intervener's right to the property, and admits certain paragraphs of the petition, not material to the matter now under consideration. No express denial of the recording of the instrument is in terms made, but the denial of the execution of the instrument must be held as a denial of the drawing and recording of the instrument, as, if not executed, it could not have been drawn and recorded. We have no doubt that the denials were broad enough to require from the intervener the formal proof made necessary by law before she could introduce the record of the instrument of adoption.

James McFadden testified that he was the guardian of the intervener, and filed the petition in this case; that he did not have in his possession the deed of adoption made by Thomas Hill, adopting Estella McFadden, formerly Estella Welton; that he did not know where it was; that he saw it, he could not say what year; that it was about the first of July, with reference to the time it was made. This evidence was objected to as incompetent and immaterial, and because he would not be likely to have the instrument. He then testified that he did not know that it was recorded, but had instructed Charles Baker and Mr. Beaty to have it recorded. This evidence was objected to as incompetent and immaterial, and because not the best evidence. The intervener then offered in evidence the record of the deed of adoption and the index of the same. This was objected to for the same reasons, and also because no foundation had been laid for the introduction of secondary evidence, and it was not proven to be the record of the deed of adoption which was executed by

the parties, and did not purport to be signed by Eliza D. Hill, under whom the defendants claim title, and would not vest the heirs of Thomas Hill with title. The evidence was received.

This was all the evidence introduced as laying the foundation for the introduction of the record of the instrument. We think it was insufficient for that purpose. Our statute provides that "the record of such instrument or duly authenticated copy thereof, is competent evidence whenever the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control." Code, section 3660. Section 3659 provides: "Every instrument in writing affecting real estate which is acknowledged or proved, and certified as heretofore directed, may be read in evidence without further proof." These two sections are found in the chapter on "Evidence" and under the subheading, "Instruments Affecting Real Property." If it should be conceded, for argument's sake, that an instrument of adoption is an instrument affecting real property, within the meaning of these sections, still the proper foundation for the introduction of the record was not laid. By these sections the record is made competent only when the original is shown to be lost, or not belonging to the party wishing to use it, or not within his control. Now, there was no showing that the instrument was lost. The witness simply testifies that he has not got it; has not seen it for years. He traced it into the possession of Charles Baker and Mr. Beaty, whom he instructed to have it recorded. It may, perhaps, be said that he has shown that it was not under his control, as he testifies he did not have it, did not know where it was, and that, when he last saw it, it was in the hands of other parties. See *McNichols v. Wilson*, 42 Iowa, 392. But we do not think it was shown that it did not belong to the party wishing to use it, or that she did not have

it, or that it was not within her control. The witness was guardian for the intervener. He was appointed but a few days before the suit was brought. He was merely a nominal, though necessary, party, by reason of her minority. He was not the real party in interest, in fact, wishing to use this instrument. For all that appears, he never had had possession or control of her papers relating to this property. It was for her benefit that the paper was to be used; she was the real party in interest in the litigation. So far as this record shows, she may have had this very paper in her possession or under her control. It seems to us that it would be going too far to say that a proper foundation was laid for the introduction of this record by simply showing that the guardian was not in possession of the paper, and did not know where it was, when no effort was made to show that it was not in the possession or under the control of his ward, the person for whom he was acting in the litigation. See *Williams v. Heath*, 22 Iowa, 521; *Kreuger v. Walker*, 80 Iowa, 735; *Oileman v. Kelgore*, 52 Iowa, 39. But it is clear that an instrument of adoption is not such an instrument as is contemplated by sections 3659 and 3660 of the Code. It is not necessarily an instrument "affecting real property," in the sense in which that language is used in those sections. It is an instrument affecting the legal status of the parties to it, but it does not describe real estate, nor affect it, within the contemplation of these sections.

Appellee contends that this record was original evidence; that it was primary; that no foundation need be laid for its admission; that it was admissible under section 3702 of the Code. That section reads: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record, or paper so filed." Now, the record introduced was not

of a paper belonging to a public office, nor was it of a paper by law required to be kept therein. This adoption paper was not required to be kept on file in the recorder's office, nor did it pertain to or belong to a public office. It was a private contract, entered into under sanction of law, and required to be recorded. The mere fact that the instrument must be recorded in order to be effectual as an article of adoption did not make the record of it original evidence. True it is that, when recorded, the record of the paper is a public record in the sense that it is open to the inspection of any person interested therein; but it is not public in the sense that the paper itself, from which the record is made, must remain lodged in a public office. The section relied upon relates to certified copies of an original record, not of the original paper recorded. It also applies as to papers which belong to a public office, or are by law to be filed and kept therein. The section has no application to a case like that at bar.

This case comes within the general rules requiring the production of the best evidence of which the fact to be established is susceptible. This rule is in force in this state, except in so far as it has been modified by statute. *Williams v. Heath*, 22 Iowa, 521. The distinction between primary and secondary evidence is still recognized, but, by sections 3659 and 3660 of the Code, secondary evidence is made competent under certain circumstances. Speaking with reference to the steps necessary to be taken as preliminary to the introduction of secondary evidence, a learned author says: "But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenleaf on Evidence [15 Ed.], section 558. Measured by this standard, the intervener failed to lay the

proper foundation entitling her to introduce the record of the instrument of adoption. No evidence that the paper is not in the possession or under the control of the real party in interest; no showing that any effort was ever made to find it; no pretense that inquiry was made for it of Baker or Beaty, in whose hands the witness had last seen it. Surely, under such circumstances, the record evidence is not competent to establish the adoption of the plaintiff. There is, then, no evidence establishing the adoption of the intervener plaintiff, and the finding in that respect was not warranted.

There was some evidence as to admissions of Hill that he had adopted the intervener; but this phase of the question is not argued by counsel for the intervener, and, not being relied upon by them, we do not consider it. It not having been shown by proper evidence that intervener was adopted by Thomas Hill, it follows that she can not recover. Under these circumstances, we are not called upon to consider the many other questions raised.

On plaintiff's appeal, the case is **AFFIRMED**; on defendant's appeal, it is **REVERSED**.

GEORGE R. MOORE, Appellant, v. ROCKFORD INSURANCE COMPANY, Appellee.

Fire Insurance: PREMIUM: PAYMENT: EVIDENCE. Where in an action upon a fire insurance policy, the plaintiff alleged that the premium was paid by placing the amount thereof to the insurance company's credit in its account with him as its agent, pursuant to a verbal agreement between him and the company, *held*, that evidence that the plaintiff had executed a bond to the company as agent was immaterial. (1)

SAME: WAIVER. Where payment of the premium upon a fire insurance policy is made after loss has occurred the presumption is that it is made too late, and the burden is upon the insured to show an acceptance of the premium by the insurance company. (2)

SAME. The agreement of the parties in such case being that the premium should be paid upon delivery of the policy, *held*, that evidence of the course of dealing between the plaintiff and the insurance company in respect to extending the time for the payment of the premium in previous years, either by crediting the company in the account between it and the plaintiff or otherwise, was immaterial. (3)

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

TUESDAY, JANUARY 23, 1894.

ACTION on policy of insurance. There was a verdict and judgment for the defendant, and plaintiff appeals.—*Affirmed*.

Remley & Ercanbrack for appellant.

Sheean & McCarn and *Marshall & Taggart* for appellee.

KINNE, J.—The petition in this case was originally filed by the Union Building Association, and in substance it stated that on October 16, 1888, the defendant issued to George R. Moore its policy of insurance against loss by fire on certain buildings in Oxford Junction, Iowa; that at that time said association held a mortgage on the property for two thousand, five hundred dollars, and the policy contained a provision: "Loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear;" that on February 5, 1889, the building was partially destroyed by fire, resulting in a damage to said association in the sum of one thousand, five hundred dollars. The policy contained a statement as follows: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof is actually paid." The defense pleaded is that the premium for this policy was never paid. The plaintiff in a reply, and for an estoppel, pleaded a cer-

tain recital in the policy wherein the receipt of the premium was acknowledged, and also averred that the plaintiff had no knowledge that the premium had not been paid, and that the defendant had never demanded same. On the issues thus made, the case was submitted to a jury, who found a verdict for the plaintiff, from which the defendant company appealed. The cause was reversed. See *Union Bldg. Ass'n v. Rockford Ins. Co.*, 83 Iowa, 647. After the case was reversed, an amendment to the petition was filed, whereby it was made to appear that George R. Moore had become the owner of the interest of the Union Building Association, and he was substituted as plaintiff. In this amendment he avers that, at the time the policy was issued, he was soliciting insurance for the defendant company, and collecting premiums for it, and received a commission thereon; that, as agent of the defendant, he kept an account with it, and that, when said policy was issued, the defendant was credited upon said account with the amount of the premium, less commission due the plaintiff, and the same was subject to the order of the defendant; that the defendant never demanded said premium of him; that the year before this, and in other years, the defendant had not demanded that the premium for the insurance of the property covered by said policy should be paid to it, but permitted it to lie in the plaintiff's hands; that, by the manner in which the defendant conducted its business, the plaintiff was led to believe that it did not require the premiums remitted, but only required that credit should be given it upon the account with said agency; that after said loss the defendant refused to accept said premium, and to adjust said loss, claiming said premium had not been paid. The defendant answered, denying all the allegations in said amendment. Afterward, the plaintiff filed an amendment to his reply, in which it is averred that it was verbally

agreed between plaintiff and defendant that a credit should be, and was, extended to the plaintiff for the premium on said policy, and that plaintiff should remit same to defendant, with any other money due the defendant for premiums received by the plaintiff, as defendant's agent, in the course of business in the future; that the premium on this policy was not exacted in advance as a condition of the delivery of the policy, but the plaintiff was to have such time as he might desire in which to remit, as had been the custom before that time; that a credit was given defendant for the premium. After the evidence of the plaintiff was in, and after the defendant had made its motion for a verdict, the plaintiff amended the amendment to his petition by striking out the words, "Defendant refused to accept said premium." The court sustained the defendant's motion, and directed a verdict for the defendant.

I. It is insisted that the court erred in not permitting the plaintiff to testify as to what commission he was allowed on the policy in controversy, and that such commission was the same as that allowed him on other policies, and that the defendant had carried insurance on this property for prior years. An examination of the record shows that, while objections were taken, and sustained, to the questions indicated above, yet during the course of the examination of the witness he did testify fully and without objection to the same matters; so that the error, if any, was without prejudice.

The plaintiff was asked if he had not executed a bond to the company as agent. An objection to the question was sustained. The ruling was proper. Whether or not he had given a bond as agent could in no way tend to establish his claim that he had an agreement with the company to credit them with the premium in his account with them. The proposed evidence, in any view, was wholly immaterial.

II. The plaintiff contends that he sent the premium to the defendant a few days after the fire, and that it retained the same, and hence must be held to have waived payment in advance of the premium. Touching the payment of this premium, the pleadings make the following allegations: In the petition there is no direct allegation relating thereto. In the answer it is averred that no premium was ever paid. In the original reply it is averred that "said premium was paid at the time said policy was issued, and was either remitted by said Moore to defendant, or was in the hands of said agent, and defendant had been credited therewith on defendant's account with said agent." The reply also states that the defendant, since the loss, had refused to pay or adjust the same, because it claimed the premium had not been paid. In an amendment to the petition, there is no claim that the premium was paid after the loss, but it is alleged to have been paid when the policy was issued, by crediting the amount in the plaintiff's account with defendant. It is expressly averred therein that, after the loss, the defendant refused to accept the premium, and denied its liability, because the premium had not been paid. It is true that after all the plaintiff's evidence was in, and after the defendant had moved for a verdict, the plaintiff amended the amendment to the petition by striking out the allegation that "defendant refused to accept said premium." Now, it is claimed that, inasmuch as the defendant had a denial in to the petition, and the plaintiff introduced evidence relating to sending the premium after the loss, therefore the question as to whether the defendant had waived advance payment of the premium should have been submitted to the jury. The plaintiff testified that he sent the money to the defendant a few days after the loss occurred, but there is nothing to show that the defendant ever received or accepted it. On the contrary, the plaintiff introduced in evidence a

letter from defendant's secretary, written after the loss, in which defendant denies liability, on the ground that the premium had not been paid. This letter was written long after the plaintiff claims he sent the premium. Now, we think that, when a premium is sent in after a loss, the presumption is it was sent too late, and the burden in such case of showing an acceptance by the company is on the plaintiff. The plaintiff has failed to show that defendant accepted the premium after the loss. The case was not tried upon any such theory. The claim of the plaintiff was that the premium was paid when the policy was issued, either directly or by placing the amount thereof to defendant's credit in its account with him as its agent.

III. It will be observed that on the former appeal it was found and held that the policy was not delivered to Moore upon a credit, but that the parties to the contract of insurance intended it as a cash transaction. The evidence on that appeal, as in the present one, shows that Moore agreed to remit the premium on receipt of the policy. The policy was sent him under that agreement. That agreement contemplated no credit, either on Moore's account as agent or otherwise. The obligation of the defendant company to pay did not exist, because the premium had not been paid. It being clear from all the circumstances surrounding the execution of the policy, that there was no intention on the one hand, nor expectation on the other, that time should be given in which to pay the premium, any and all evidence as to the course of past dealings between the parties in respect to extending time in previous years for the payment of the premium, either by crediting the company in his account with them or otherwise, was wholly immaterial. The provisions of the policy itself, taken in connection with plaintiff's letter wherein he promised to "remit" if the policy was sent, and of the defendant's letter inclosing the policy, wherein

the plaintiff was asked to remit the amount of the premium, clearly shows that there was no ground for claiming that there was any thought of credit being extended for the payment of this premium. As this branch of the case was fully considered in the former appeal, there is no call for more extended discussion. The court below properly directed a verdict for the defendant. **AFFIRMED.**

90 642
d92 278

**PETER BLINK, Appellee, v. J. C. HUBINGER *et al.*,
Appellants.**

Master and Servant: DEFECTIVE APPLIANCES: PERSONAL INJURY:
EVIDENCE. The defendants, having agreed to assist S., who was to use his own machinery and appliances, in raising a smoke stack, directed their foreman to take the plaintiff, and others in their employ, and help S. in that work. While thus engaged, the machinery used by S. in raising the stack, broke, the stack fell, and the plaintiff was injured. The plaintiff had for some time been regularly employed by the defendants, and one of the members of the firm was present during a part of the time that the stack was being raised. *Held*, that at the time of the injury the plaintiff was not the servant of S., but of the defendants, and that the latter were liable for the damages sustained.

Appeal from Lee District Court.—HON. J. M. CASEY,
Judge.

TUESDAY, JANUARY 23, 1894.

THIS is an action at law to recover damages for a personal injury received by the plaintiff while engaged in raising a smoke stack into an upright position. The smoke stack was part of an electric light plant owned by the defendants. While engaged in raising the stack with a derrick, the machinery and appliances connected therewith broke and gave way, and the stack fell, by reason of which the plaintiff was seriously injured. There was a trial by jury, and a verdict and judgment for seven hundred and fifty dollars, and the defendants appeal.—*Affirmed.*

James H. Anderson and J. W. Cahill for appellants.

James C. Davis and A. Hollingsworth for appellee.

ROTHROCK, J.—I. The pleadings are in the usual form in actions of this kind. The plaintiff charges negligence, on the ground that the machinery used to elevate the shaft was insufficient and defective, and that the defendants were negligent in ordering the plaintiff into a place of danger, without giving him necessary instructions to enable him to avoid the hazard in which he was placed. The defendants, in addition to a general denial, averred that the plaintiff was guilty of negligence, which contributed to produce the injury.

The plaintiff had been for several years employed by the defendants. His labor consisted in setting electric light poles, stretching wires, painting poles, and other service in connection with the plant. He was directed by the defendant, J. C. Hubinger, or rather the foreman under whom he worked was directed, to take the plaintiff and others, and assist in raising the stack. The stack was about thirty or forty inches in diameter, and about one hundred feet long, and it was to be raised, not merely in a perpendicular position on the ground, but the lower end was to be placed on a brick foundation some twenty-five feet high, so that, if the work had been completed, the top of the stack would have been about one hundred and twenty-five feet from the surface of the ground. When the machinery broke, and the stack fell, the plaintiff was engaged at work below with the windlass, by which the stack was being raised. The immediate cause of the crash was the breaking of the gin pole, and the giving way of a guy rope. There is not one word of evidence in the whole case from which any jury would be authorized in finding that the plaintiff was negligent. On the contrary, the facts ought to be regarded as undisputed

that he was free from any negligence. He was a common laborer, under the immediate direction of others, and had no reason to suspect that he was in any danger. The case has been elaborately argued, and a multitude of authorities cited by counsel for both parties. We must decline to review these authorities. The rules by which the rights of the parties must be determined are elementary, and have been so often applied by the courts, and so well understood by the profession, that they need no citation of cases for their support.

The above remarks are peculiarly applicable to what we regard as the only real question in the case. The question is, was the relation of the defendants to the plaintiff such that the defendants are not liable to him for the injury. This question is raised by the defendants. We may say in this connection that if the defendants were at the time the masters of the plaintiff, and he was their servant, working under their direction, the master would be liable for negligence in furnishing insufficient machinery and appliances with which to do the work; and, if the work was attended with danger which was not apparent to the servant and known to the master, it would be the duty of the master to warn the servant of the danger.

The ground upon which the defendants claim that they are not liable is that the plaintiff, at the time he was injured, was assisting one Sinton, who was an independent contractor, who had undertaken the work of raising the stack, and placing it in position, with his own machinery and appliances, which were being operated by Sinton. The defendants requested instructions embodying this view of the law, which were not given to the jury. We think they were rightly refused, because they were not applicable to the undisputed facts, as disclosed in evidence. It is shown beyond all question that the plaintiff was not an employee of Sinton. He was to receive no compensation from him.

He was under the pay of the defendants. The defendants were to furnish assistance in raising the stack, and, in pursuance of that obligation, the defendant Hubinger directed one Geltz, who was foreman of the gang to which the plaintiff belonged, to go with his men and assist in the work. The defendant J. C. Hubinger was personally present when the work was commenced, and remained there until a very short time before the disaster occurred. He was not only present, but he was active in giving directions. He was present until the stack was partly raised up, when he went up on a hill close by, and he stopped on the hillside, and saw that the gin pole was bending. Under this state of facts the defendants are liable to plaintiff, if any one is liable. It was on this theory that the case was submitted to the jury, with a clear and unobjectionable charge by the court upon the law of negligence and contributory negligence, applicable to the evidence introduced on the trial; and instructions requested by the defendants to be given to the jury, to the effect that the defendants were not liable if Sinton was an independent contractor, were rightfully refused. Other requests to charge were properly refused, because the same features of the case were correctly presented to the jury in the instructions given by the court.

II. Other objections are made to the rulings of the court, which we need not specially mention. They appear to us to be without merit, and a separate consideration of them would serve no useful purpose. A full and careful examination of the whole case leads us to the conclusion that the verdict and judgment are not only right, but that no prejudicial error occurred in the trial in the district court. The facts attending the whole transaction are such, and the law applicable thereto is so plain, that there was no liability for any judge to fall into reversible error while presiding at the trial.

The judgment of the district court is **AFFIRMED**.

90	646
117	280
117	281
90	646
132	133

**EMLIN McCLAIN, Appellee, v. CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY, Appellant.**

Railroads: RIGHT OF WAY ABANDONMENT. Where by the terms of a conveyance of land to a railroad company the same is to become forfeited, and revert to the grantor, when the railway company ceases to use the same for railway purposes, the grantor may maintain an action for the recovery of such land on the ground of nonuser or abandonment thereof by the railroad company, although the nonuser may not have continued for the period of eight years, as provided by section 1260 of the Code. (1)

SAME: EVIDENCE. In such case, evidence that the land in question was part of a right of way for a spur track from the railway company's main line to a coal mine, that it was obtained without cost to the railway company, that the mine had been abandoned for a number of years, and that the right of way had not since been used for railway purposes, is admissible in proof that the railroad company had ceased permanently to use the right of way over the land in question. (2)

Appeal from Polk District Court.—HON. CHARLES A. BISHOP, Judge.

TUESDAY, JANUARY 23, 1894.

ACTION to recover possession of a certain strip of land heretofore conveyed, as per deed set out, as a right of way, to the defendant's grantor by the plaintiff and another, then owners of the tract out of which said strip was taken. The plaintiff, now the owner of said tract, alleges, as ground for recovery, that the defendant and its said grantor "have long since ceased permanently to use the track laid upon said right of way, or to use said right of way in any manner for railway purposes, and said track and right of way have long since been abandoned, and the route thereof changed, so as not to be continued over the said premises, whereby all the rights and interests of the said railway com-

panies, or either of them, have ceased and determined." The plaintiff further alleges that the defendant continues to occupy said strip of land with its track, and thereby prevents him from taking and keeping possession thereof as is his right, to his damage two hundred dollars, which, with possession, he asks to recover. The defendant's demurrer to the petition being overruled, an answer was filed, admitting the conveyances set out, and that the defendant constructed a track upon said right of way, and operated the same. The defendant denies that it has ceased permanently to use said track, or that said track and right of way have been abandoned, or that the right and interests of the defendant or its grantor have ceased and determined, and denies that plaintiff is entitled to possession. Upon these issues, the case was tried to a jury, and verdict returned "that the plaintiff is entitled to possession." The defendant's motion for a new trial being overruled, judgment was entered on the verdict. The defendant appeals.—*Affirmed.*

Hubbard & Dawley for appellant.

Cummins & Wright for appellee.

GIVEN, J.—I. The defendant demurred, on the ground that the petition did not show an abandonment for the period of eight years, as provided by section 1260 of the Code. The same question was raised by motion for verdict, and on the instructions, and is the controlling question presented on this appeal. Said section provides "that if said roadbed or right of way, or any part thereof, shall not be used or operated for a period of eight years, * * * the land and title thereto shall revert to the owner of the section, subdivision, tract, or lot from which it was taken." In the absence of statute, mere nonuser for any length of time would not work a forfeiture. *Barlow v. C., R. I. & P. Rail-*

way Co., 29 Iowa, 276. If the nonuser was permanent, that is, without an intention to resume the use, it would constitute abandonment, without regard to the length of time the right of way had not been used. Without the statute, to constitute abandonment there must have been a permanent cessation to use; that is, a cessation to use, with an intent not to resume the use. Under the statute, mere nonuser for eight years constitutes abandonment, regardless of the intention of the company.

The plaintiff has not alleged, and does not claim, nonuser for eight years, but does claim abandonment, under the terms and conditions of the deed. The defendant contends, on the authority of *Fernow v. C., M. & St. P. Railway Co.*, 75 Iowa, 526, that the statute alone controls. In that case Fernow had granted a right of way upon which a track was laid and operated until November, 1878, when the track was taken up, the right of way fence being left. Fernow entered upon and cultivated the right of way without leave until July or August, 1886, when the defendant relaid a track, and ran trains thereon. Fernow sued for trespass, and it was held that, as eight years' nonuser had not elapsed, the defendant was not a trespasser. It was contended that the statute does not take away the common law right of forfeiture, but merely gives an additional remedy. This court held that the principle contended for was not applicable to the question under consideration; that the statute defines what shall be regarded as abandonment. "It definitely fixes the rights of the parties, and, under its provisions, nothing less than nonuser for eight years will authorize the owner of land from which it was taken to take possession of the land." It is previously stated that "there is nothing in the conveyance of the right of way in the way of condition, proviso, or limitation, as to the line of road." Clearly, in the absence of contract, the statute controls;

but it does not follow that the parties may not agree upon a forfeiture of the easement upon other terms than those provided in the statute. No such conditions were contained in the conveyance of the right of way in *Fernow's case* as in this, nor does that case hold that the parties may not agree that abandonment shall follow, if the grantor shall at any time "cease permanently" to use the right of way for the purposes for which it was conveyed. The lower court instructed that "abandonment," as the word is used in this case, means simply a permanent cessation of the use of the right of way in question for railway purposes, and submitted the question of fact to the jury. We think there was no error in overruling the demurrer or in the instructions.

II. On the trial, the plaintiff was permitted to introduce evidence, over the defendant's objection, tending to show that the right of way in question was part of a right of way for a spur track from the defendant's main line, running south to a coal mine; that, to induce the construction and operation of the track to the mine, the owners of the mine procured the right of way for the defendant free of cost to defendant; that the mine was abandoned in February, 1885; and that said right of way has not since been used for railroad purposes, and especially that part across the plaintiff's land, and south thereof. The defendant introduced evidence tending to show that the track was used for railroad purposes. The defendant contends that the court erred in admitting the evidence introduced by the plaintiff, because its effect was to show agreements not expressed in the deed. This evidence was unquestionably not admissible for such a purpose, but it was admissible upon the question whether the defendant had ceased permanently to use the right of way through and south of the plaintiff's land, and, under the instructions, could not have been considered for any other

purpose. Upon this evidence, the jury were warranted in finding as they did. Our conclusion is that the judgment of the district court should be **AFFIRMED**.

**UNION MERCANTILE COMPANY Appellant, v. J. R.
CHANDLER, Appellee.**

Action on Attachment Bond: PLEADING. Where in an action on an attachment bond the plaintiff alleged the filing of the bond whereby the attaching creditor agreed to pay all damages that might be sustained by the wrongful suing out of the attachment, and made said bond and the writ of attachment parts of the petition, *held*, that the petition would be construed as presenting an action on the bond rather than a common law action for the malicious suing out of the writ, although the amount claimed in the petition was largely in excess of the amount of the bond. (1)

SAME: LIMIT OF RECOVERY: INSTRUCTIONS TO JURY. The jury having returned a verdict in such case for an amount largely in excess of the amount of the bond, and the excess having been remitted by the successful party, *held*, that the refusal to give an instruction to the jury that in no event could a recovery be had for an amount in excess of the bond was without prejudice. (2)

SAME: DAMAGES: PROPERTY SOLD BY RECEIVER. Where an attachment is levied upon incumbered property, and a receiver is appointed upon the petition of the attaching creditor, the latter's liability for the wrongful suing out of the attachment is not confined to the excess remaining in the receiver's hands after the satisfaction of the prior liens. (3)

SAME: LEVY ON MORTGAGED CHATTELS. The fact that an attachment was levied upon mortgaged chattels, which are not subject to attachment, will not relieve the attaching creditor from liability for damages for the wrongful suing out of the attachment. (4)

SAME: JUDGMENT: REMITTITUR. An excessive verdict for unliquidated damages may be remitted in part by the successful party, and judgment taken for the balance. (5)

SAME. The claim for damages on the bond being set up by way of counterclaim in the attachment suit, and the claim of the attaching creditor being admitted, *held*, that the attachment defendant could not recover a sum in excess of the amount of the bond, less the plaintiff's claim, but that a judgment for the full amount of the bond would not be reversed, as the district court could be directed to enter judgment in the proper sum upon the facts established. (6)

90	650
100	562

90	650
100	362
90	650
120	576

90	650
125	39

90	650
134	462

90	650
144	153
144	163

SAME: ATTORNEY FEE. A recovery in damages for the full amount of an attachment bond will not preclude the taxation of an attorney fee in such case, that being a part of the costs. (7)

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

WEDNESDAY, JANUARY 24, 1894.

ACTION on an account, aided by attachment. The account is admitted, and a cross action filed for the wrongful suing out of the attachment. There was a verdict and judgment for the defendant. The court refused the defendant an attorney's fee, and both parties have appealed.—*Upon defendant's appeal, reversed; upon plaintiff's appeal, modified and affirmed.*

A. A. Haskins for plaintiff.

Berryhill & Henry for defendant.

GRANGER, C. J.—The account sued on is for fifty-seven dollars and twenty-nine cents, and it is by the answer admitted. The damages sought in the cross action were one thousand, five hundred dollars. The bond filed in obtaining the attachment was in a penalty of two hundred and fifty dollars. The sureties on the bond are not parties to the cross action. The attachment was levied on a leasehold interest in a lot and building and on a stock of goods, on all of which were prior liens. On the application of the plaintiff, a receiver was appointed, who, under orders of the court, sold all the property for six hundred and thirty-four dollars and fifty-three cents, and applied the same to the discharge of the prior liens, so that nothing remained under the attachment. The trial of the issues for the wrongful suing out of the attachment resulted in a verdict for the defendant for nine hundred and sixty-eight dollars. The defendant filed a remittitur of the damage in

excess of the penalty of the bond (\$250), and judgment was entered for that sum. The jury returned special findings that the attachment was wrongfully, but not maliciously, sued out. We will first notice the assignments of error by the plaintiff.

I. The parties are in contention whether the cross action is a statutory one on the bond, or a common law action for maliciously suing out the writ; the plaintiff maintaining that it is the latter. The court below held the cross action to be on the bond, and, we think, rightly so. The cross petition does not bear the usual evidence or indications of a petition in an action for damage for the suing out of a writ of attachment maliciously and without probable cause. Its allegations, though not in some respects apt, are more nearly in conformity to the usual pleading in an action on the bond. A paragraph of the cross petition states "that, at the time of the suing out of said writ of attachment, the plaintiff filed with the clerk of this court an attachment bond, wherein it bound itself to pay all damages this defendant might sustain by reason of the wrongful suing out of said attachment. Said bond and said writ are hereby made a part of this answer and counterclaim as though fully set forth herein." We infer the intent of the pleader to have been to make the bond and writ parts of the petition, by reference to them as parts of the record in the case. The law, of course, requires the bond, as an instrument on which recovery is sought, to be set out in, or attached to, the petition; and it is quite manifest that an omission to do so is but an error in pleading. The plaintiff suggests that the fact that the petition claims one thousand, five hundred dollars as damage, when the penalty of the bond is only two hundred and fifty dollars, shows that the action was not intended as on the bond. The defendant's answer to the petition is that the excessive amount was claimed under a belief that, inasmuch as

the action was alone against the plaintiff, the penalty on the bond would not limit his liability in the suit; that the penalty only limited the liability of the sureties on the bond. The district court held that the limitation applied alike to the principal and sureties, upon which, as we understand, the remittitur was filed. That view is in harmony with the general averments of the petition, and preserves their force, while the other view renders some of them entirely without force, and irrelevant.

II. Plaintiff asked the court to give an instruction to the effect that in no event could the defendant recover a sum in excess of two hundred and fifty dollars, which the court refused. The instruction should have been given. From the record, however, we may assume that, had it been given, the defendant's recovery would have been for the full penalty of the bond, because, under the same evidence, it was largely in excess of it. The filing of the remittitur, then, placed the plaintiff in the position he would have been in had the instruction been given; hence, the error was without prejudice.

III. It will be remembered that, after the levy of the attachment, at the instance of the plaintiff, a receiver was appointed, who, under order of the court, sold the property, and applied the proceeds to the discharge of prior liens. In view of these facts, the plaintiff asked the following instruction: "You are instructed that, unless you find that some money or property came into the hands of the sheriff or receiver after the payment of prior claims and incumbrances, then your verdict will be for plaintiff for the amount of its claim. The defendant, if you should find the attachment was wrongfully or maliciously sued out, could only recover the amount of the money on his counterclaim which came into the hands of the sheriff or receiver of this court, with six per cent. interest

thereon." The meaning of the instruction is that the liability of the plaintiff on the bond is limited to the excess in the hands of the sheriff or receiver after the discharge of prior liens: and as, in fact, there was no excess, there is, in law, no liability. The court denied the instruction, and permitted as one item of recovery the difference between the market value of the property when attached, and the sum realized from the sale by the receiver. It seems to us that the rule adopted by the court is correct. The wrongful attachment of the property caused the appointment of the receiver, and the sale by him. Now, if, by the wrongful seizure of the defendant's property, it has been sold for less than its fair market value when taken, we think that he should be allowed, in addition to what it sold for, enough to give him its market value; and that is what the court allowed. We are not to lose sight of the fact that it was the attachment that caused the proceedings resulting in the sale for less than the market value.

IV. The plaintiff claims exemption from liability because the property seized by the attachment was mortgaged, and hence that the attachment was void, and cites *Gimble v. Ferguson*, 58 Iowa, 414, and *Tootle v. Taylor*, 64 Iowa, 629. The distinction is so manifest that we think the proposition is hardly entitled to discussion. The cases turn upon entirely different questions.

V. It is said that the court erred in permitting a remittitur to be filed by the defendant, because the damage was unliquidated. We know of no reason why damages, though unliquidated, when fixed by the finding of a jury, may not be remitted, in whole or in part, by the party in whose favor they are assessed. It is an act favorable to the other party, of which he should not complain. The fact that, by the remittitur, an error in the proceedings is cured that would otherwise be prejudicial to the party against whom the dam-

age is assessed, gives to such party no ground of complaint. Concessions in avoidance of errors in legal proceedings are to be encouraged, rather than disapproved.

VI. The plaintiff insists that the cause must be reversed because the amount of the plaintiff's claim has not been deducted from the damages assessed in the counterclaim. The defendant's theory is that, under the instructions of the court, the jury found the amount of damage, and, after deducting the fifty-seven dollars and twenty-nine cents, it gave its verdict for the nine hundred and sixty-eight dollars; and we think that it is the correct view of how the result was reached. But the conclusion does not reach the difficulty. It is the law of the case that the limit of recovery in the cross action is two hundred and fifty dollars. The defendant has no basis for a recovery in the case, either by way of set-off or judgment, except the cross action, and that is on the bond. If he retains the judgment for two hundred and fifty dollars, and is permitted to set off the plaintiff's account, then he has realized from the cross action three hundred and seven dollars and twenty-nine cents, which he is not permitted to do. But must we, because of this, reverse the judgment and remand the case for a new trial? The facts are conclusively settled. The findings of the jury on the defendant's counterclaim, with the law applied, fix the damage at two hundred and fifty dollars. The plaintiff's account is admitted, and, under the law, should be deducted, and defendant given a judgment for the balance. The case requires but an application of the law to the established facts. Such a judgment by the district court would have conformed to the law, and met with affirmance on appeal. The district court will, on the return of a case, enter such a judgment. This disposes of the case on plaintiff's appeal.

VII. The defendant asked the court to assess an attorney's fee in his favor because of his recovery on the attachment bond, and the court refused, from which order the defendant appealed. Counsel seem to agree in argument that the theory of the court below was that an attorney's fee could not be added to the recovery on the bond of two hundred and fifty dollars. This court has recognized the rule that attorney's fees, when allowed, are a part of the costs. See *Musser v. Crum*, 48 Iowa, 52; *Weller v. Hawes*, 49 Iowa, 45. If a part of the costs, the recovery, under the conditions of the bond, would not defeat the defendant's right to it. We think the defendant was entitled to a reasonable fee, to be fixed by the court, and that, upon a return of the cause, it should be allowed.

Upon defendant's appeal, the order of the court is REVERSED; upon plaintiff's appeal, the judgment is modified and AFFIRMED.

DAVID SIM, Appellant, v. JOHN RUSSELL *et al.*,
Appellees.

Wills: CAPACITY OF TESTATOR: EVIDENCE. In proceedings attacking the validity of a will on the ground of the mental incapacity of the testator to make a will, the condition of the testator's health in previous years, and at or about the time the will was made, may be shown for the purpose of showing the impairment of the mental faculties by long and continued illness. (1)

SAME. Where the contestant in such proceeding was the son of the testator, and a legatee for only a nominal sum, and the bulk of the testator's estate was given to persons not related to him or to distant relatives, *held*, that the proponents were entitled to show the financial condition of the contestant as supporting the reasonableness of the will. (2)

SAME: UNDUE INFLUENCE. The reasonableness of the will in such case may be considered, in connection with other circumstances, in ascertaining the actual mental condition of the testator when the will was made, the motives which prompted him, and the influences to which he was subject. (3)

90 656
93 608
94 849

90 656
106 215

90 656
108 218

90 656
115 424

90 656
1125 341

90 656
136 339

SAME: EVIDENCE. It being stated in the will that the reason for giving the contestant but a nominal sum was, that he had been given the use of the testator's farm for many years, and that the same had been sold to him for one thousand dollars less than the testator had been offered for it, *held*, that the proponents were properly permitted to show the negotiations between the contestant and the testator in regard to the sale of said farm. (4)

Appeal from [Jones District Court.—HON. JAMES D. GIFFEN, Judge.

WEDNESDAY, JANUARY 24, 1894.

ACTION to set aside the probate of a will, and to have the will declared to be void. There was a trial by jury, and a verdict and judgment for the defendants. The plaintiff appeals.—*Reversed.*

J. W. Jamison and W. I. Chamberlain for appellant.

Sheean & McCarn for appellees.

ROBINSON, J.—In the year 1890, John Sim, a resident of Jones county, died, leaving an estate of the value of about four thousand dollars. His wife had died some years before, and the plaintiff was his only child. In May of the year specified, what purported to be the last will of the decedent was admitted to probate. It was executed on the fifth day of March, 1888, and bequeathed to the plaintiff the sum of twenty-five dollars; to William Orford, the sum of two hundred dollars; to a church, one hundred dollars; to John Russell, one hundred dollars and a walking stick; and to other persons, pictures and certain articles of small value. The will provided that the remainder of the property of the testator should be divided among two nieces and two nephews, who resided in Scotland; and appointed John Russell and William Paul executors. The grounds upon which the

plaintiff attacks the probate of the will are that the notice thereof was insufficient, that the decedent was not competent to make a will at the time the one in question was made, and that it was obtained through undue influence. The plaintiff was married in the year 1871, and from that time until after the death of his father has lived upon and carried on the farm which was his father's home. His mother died in the year 1873, and his father lived with him from that time until the year 1886, when he went to Onslow, and there boarded with Mrs. Walters until he died. The influence which the plaintiff alleges was the wrongful cause of the making of the will, so far as the evidence shows, was exercised, if at all, during the two or three months which preceded the making of the will.

I. The plaintiff was introduced as a witness, and was asked in regard to the condition of his father's health for some years before he died, and especially at the time of the making of the will, and before and about that time; but objections to his answering the question were sustained. It was the theory of the plaintiff that his father's mental faculties had been impaired by long and continued illness to such an extent that he was incompetent to make the will, and that, if he was not incompetent, his mental condition was such that he was easily influenced by others to do what he would not have done if free from such influence. We think the answers of the witness should have been received. The questions did not relate to any personal transaction or communication between him and the decedent, and the answers would have been competent evidence of a material fact. *Severin v. Zack*, 55 Iowa, 28; *State v. Shelton*, 64 Iowa, 338; *Parsons v. Parsons*, 66 Iowa, 755.

II. The appellant complains that the appellees were permitted to show the amount of property he owned when the will was made. Inasmuch as the

plaintiff attacked the will in part because it was unnatural and unreasonable for the decedent to make to his son only a nominal bequest, and to give all the remainder of his estate to more distant relatives, and to persons to whom he was not related, we think it was entirely proper to show the financial condition of the son, as bearing upon the question of the reasonableness of the will. If the son had ample property to support himself and family during their life, that, with other facts, might tend to show that the disposition of property made by the will was not unnatural, and that it was reasonable.

III. The court charged the jury as follows: "Sixteen. The fact, if a fact, that the will is not as you would have made it, is not to control you in arriving at your verdict. However unjust you may regard the will in its provisions, still you are not to set it aside for that reason, nor to let it have any weight with you, unless you find, from the evidence and the instructions, the will is actually invalid because of unsoundness of mind or undue influence." This portion of the charge is justly criticised by the appellant as excluding from the consideration of the jury the alleged unreasonableness of the will. If it can not be considered unless the will is found to be invalid for other reasons, it is clear that it can have no weight; whereas it should be considered, with other circumstances, in ascertaining the actual mental condition of the testator when the will was made, the motives which prompted him, and the influences to which he was subject.

IV. The appellees were permitted to show negotiations between the plaintiff and his father in regard to the sale of a farm by the latter to the former, made in January, 1888. The will recites, as reasons for giving the plaintiff but twenty-five dollars, that the testator had given the use of his farm to the plaintiff for many years without exacting any specific rent therefor, that

the farm had been sold to the plaintiff for one thousand dollars less than the testator was offered for it, and that the plaintiff had been given all the personal property which the testator owned on the farm. Evidence had been offered on the part of the plaintiff which tended to show that he had given for the farm all it was worth, and that the testator was not competent to make a will at about the time of the sale, and only a short time before the will was made. The testimony in regard to the negotiations for the purchase of the farm tended to show that the decedent had been offered for the farm one thousand dollars more than the plaintiff paid for it, and that he was regarded by the plaintiff as competent to transact business. Although the testimony may not have been very satisfactory nor of great value, yet we think it was properly received, as tending to sustain the will.

V. It is urged by the appellees that the errors we have pointed out were not prejudicial. It is true, several witnesses testified to the physical condition of the decedent during several years preceding his death, and there was but little controversy in regard to the facts which the rejected evidence of the plaintiff was apparently offered to establish. If there were no other error in the case, we might not find it necessary to disturb the judgment of the district court. It is said there was no evidence that the will was the result of undue influence; that no questions in regard to the reasonableness of the will could have been considered by the jury; therefore, that the error was without prejudice. It must be admitted that the evidence in regard to improper influence is entitled to little, if any, weight. The will appears to have been made much as the father intended for many years to make it, as indicated by former wills, and letters he had written to relatives. But the plaintiff alleges in his petition, and introduced evidence to show, that the decedent was not of sound

mind when the will in question was made. The error in the charge is presumed to have been prejudicial, and we can not say that the presumption has been overcome.

VI. Numerous questions have been presented by counsel which need not be determined. What we have said disposes of the controlling ones involved in the case. For the errors shown, the judgment of the district court is REVERSED.

J. BYFORD, Appellee, v. C. W. GIRTON *et al.*, Appellants.

Attachment: DAMAGES: EVIDENCE. Where in an action for the wrongful suing out of an attachment the answer admitted the commencement of the attachment proceeding, the issuance of the writ, and the decision of the case against the plaintiff therein, *held*, that proof of the attachment proceeding by the introduction of the records and papers filed therein, was unnecessary. (1)

SAME. Evidence in such case that, after the trial of the attachment suit, the defendant herein went to the field of the plaintiff, and made threats of prosecution, if he "did not quit shucking," claimed the property under the attachment, and took away a part of the corn, is admissible for the purpose of showing the motive with which the attachment was sued out. (2)

SAME: INSTRUCTIONS TO JURY: EXCEPTIONS: APPEAL. The statement in a motion for new trial, that the court erred in giving certain specified instructions to the jury, is not such an exception to the action of the court as will entitle a party to have the correctness of the instructions considered in the supreme court. (3)

SAME: EXEMPLARY DAMAGES: VERDIOT. It appearing that the attachment proceeding was unwarranted, and to have been resorted to more as a means of oppression or extortion than for the preservation of legal rights, *held*, that a verdict of two hundred dollars as exemplary damages would not be disturbed, although the actual damages sustained, as found by the jury, was but sixty dollars. (4)

SAME: DAMAGES COMMITTED BY AGENT: LIABILITY OF PRINCIPAL. A part of the damage complained of was committed by one of the defendants while acting as agent for his wife, and the petition herein contained no averment that any of the damage had been done by an agent, but both the husband and wife were plaintiffs in the attachment case, and defendants in this action, and the petition alleged that the wrongful acts were done by "these defendants." *Held*, that the wife was jointly liable with her husband for any wrongful acts done in the prosecution of the attachment proceeding. (5)

90	661
139	645

90	661
144	163

New Trial: GROUNDS. Newly discovered evidence which is merely cumulative in its nature is not a ground for a new trial.

Appeal from Harrison District Court.—HON. G. W.
WAKEFIELD, Judge.

WEDNESDAY, JANUNRY 24, 1894.

ACTION for the wrongful suing out of an attachment. There was a judgment for the plaintiff, and the defendants appeal.—*Affirmed.*

F. M. Dance and *Chas. Mackenzie* for appellants.

No appearance for appellee.

GRANGER, C. J.—I. The attachment, for the wrongful suing out of which this action is brought, issued in a proceeding before a justice of the peace, and the damages in this suit are laid, *first*, for expenses and loss of time in defending against the attachment; *second*, for corn taken and destroyed, and *third*, for exemplary damages. The jury made a special finding under each claim for damage, and gave for the first twenty-five dollars, for the second thirty-five dollars, and for the third two hundred dollars, with a general verdict for two hundred and sixty dollars.

It is said that there was no basis for the proofs as to actual damages, because the records and papers were not put in evidence to show the attachment proceedings, and they were the only competent evidence in the first instance. Such proofs were not necessary, for the reason that the answer admitted such proceedings, and the issuing of the attachment. It is further admitted that the suit was appealed to the district court, and there “decided against the plaintiff in that suit.”

In the same connection it is urged that the testimony as to attorney’s fees was erroneously admitted, as such fees were, in part, for defending the claim as

well as resisting the attachment. We think the appellants are mistaken in that view. Certainly the court's instructions limited such recovery to defending "against the writ," and we have looked to the evidence, and find the same rule applied there in the admission of testimony.

II. After the trial before the justice in the attachment suit, the defendants in this suit went to the field of the plaintiff, and it is in evidence that they made threats of prosecution against the plaintiff if he "did not quit shucking," and claimed the property under the attachment, and took at least part of the corn. Such evidence was proper, as showing what was done, and the motive in taking the attachment, whether malicious or otherwise. It is urged that, in the absence of a threat of physical violence, or some "overt act," the plaintiff should have maintained his possession, and that the mere statements of Girton that he would take the corn by virtue of the attachment would give no right of action. That is true. The action is not for what was said, but for what was done, for the trespass in taking and injuring the corn wrongfully. We are not prepared to say that an action will not lie for injury to property merely because physical force would have prevented the injury.

III. There are complaints as to some of the instructions given by the court, but the record will not permit us to consider them. The only exceptions taken to the instructions are embodied in a motion for a new trial, in words as follows: "The court erred in giving the second, third, fourth, and fifth instructions to the jury." It may be doubted whether such words amount to an exception. They are nearer the language for assigning error. But if we assume the intention to have them serve as an exception, and thus treat them, there is still a failure to comply with the requirements of the law where the exceptions are taken in a motion

for a new trial. The right to preserve exceptions in a motion for a new trial is given in Code, section 2789, and it provides in such cases that "the exceptions shall specify the part of the charge or instructions objected to and the ground of the objection." No ground of objection is specified in this motion. In *Patterson v. C., M. & St. P. Railway Co.*, 70 Iowa, 593, an exception in a motion for a new trial was in these words: "The court erred in giving the fourth instruction in form and manner it did, without more, as it is contradictory and misleading, and does not express the full requirements of the law." It is held that the exception was too general, and that the correctness of the instruction could not be considered. See, also, *Hale v. Gibbs*, 43 Iowa, 380.

IV. The jury assessed the exemplary damages at two hundred dollars. The award was made under an instruction that such damages were to be allowed where the injury complained of "was inflicted willfully and maliciously," and that they were given "as a protection to the plaintiff, and as a salutary example to others to deter them from offending in like manner." The validity of the instruction is not in question, and, while the amount of exemplary damages seems large, considering the actual damages, we are not prepared to say, in view of the testimony, that it is excessive. The attachment proceeding seems to have been unwarranted. In fact it seems to have been resorted to more as a means of oppression or extortion than for the preservation of legal rights.

V. The defendants are M. E. and C. W. Girton, the former being the wife of the latter. In the district court there was a motion to strike out all the evidence as to damage to corn, so far as the defendant M. E. Girton was concerned. The ground of the motion is that in the transactions as to the corn, including the suing out of the attachment, C. W. Girton was the

agent for his wife, and it is not alleged that she did the injury through her agent, but that she did it personally. The petition contains no averments as to any of the acts being done by an agent, but both were plaintiffs in the attachment proceedings, and both are made defendants in this proceeding, the petition averring the wrongful act to have been done by "these defendants." While there is evidence showing that the wife owned the land rented to the plaintiff, and owned the rental portion of the grain thereon, and that the husband was her agent in the act of renting, commencing the suit, and in fact generally, yet she knew of her being joined as party plaintiff in the attachment suit, and that it was being prosecuted for their joint benefit. Under such circumstances she is not in a position to deny a joint liability for acts done wrongfully in carrying forward the prosecution, simply because her coplaintiff was, as between them, her agent. The position may also be said to be untenable on general principles.

VI. The appellants asked for a new trial on the ground of newly discovered evidence, which was refused, and properly so, for the new testimony was but cumulative. The verdict has full support in the evidence, and other important questions are disposed of in these considerations. The judgment is **AFFIRMED**.

J. W. CLIFF, Appellant, v. SAMUEL N. PARSONS *et al.*
Appellees.

Officers of General Assembly: SECRETARY OF SENATE: TERM OF OFFICE: POWER OF REMOVAL. The term of office of the secretary of the senate is not made by section 13 of the Code to continue during the session at which he was elected, but such officer holds his office only during the pleasure of the senate appointing him, and may be removed by that body at any time without notice or hearing.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

WEDNESDAY, JANUARY 24, 1894.

ACTION to oust the defendant Parsons from the office of secretary of the senate of the twenty-fourth general assembly of Iowa, to adjudge the plaintiff entitled thereto, and to reinstate him therein. Also to enjoin the defendant Mitchell, speaker of the house of representatives, from certifying that the defendant Parsons has been elected or is secretary of said senate, and the defendant J. A. Lyon, auditor of state, from issuing warrants to said Parsons for any part of the compensation arising from said office. The defendant Parsons having answered, the plaintiff filed a demurrer to the second and fourth counts thereof, and, the demurrer being overruled, the plaintiff elected to stand on said demurrer, and appeals.—*Affirmed.*

Henry S. Wilcox for appellant.

J. M. Parsons for appellees.

GIVEN, J.—I. The petition shows that the plaintiff was authorized, by an order of one of the judges of the district court in and for Polk county, to bring this action; the county attorney of said county refusing to do so. The relator states his cause of action as follows:

“That, on or about the —— day of January, A. D. 1892, the relator, J. W. Cliff, was, by the senate of twenty-fourth general assembly of the state of Iowa, duly elected to the office of secretary of said senate, as a permanent officer thereof, to hold said office during the regular session of said senate and twenty-fourth general assembly. That, on or about the —— day of January, A. D. 1892, the said relator duly qualified, and entered upon the discharge of his duties, and has

ever since discharged faithfully the duties of said office, except when prevented by the defendant Parsons and those in conspiracy and collusion with him; and said relator has at all times been ready and willing, and is now ready and willing, to discharge the duties of said office during the term for which he was elected, and is entitled to receive as compensation the sum of seven dollars per day during said regular session, and whatever sum shall be appropriated by said general assembly for work in transcribing and indexing the journal of said senate. That, on or about the —— day of January, A. D. 1892, the defendant Parsons entered into a conspiracy with L. R. Bolter, S. L. Bestow, —— Yeomans, and others, for the purpose of illegally and forcibly despoiling said relator of his rights to said office and the emoluments pertaining thereto, and, on the —— day of January, 1892, in pursuance of said conspiracy, the said parties did wrongfully, illegally, and by force, seize and cause to be seized, the person of the said relator, and, by force and arms, ejected him from his place at the desk of said senate, and have ever since by force kept and excluded him therefrom, and from the possession of the paraphernalia of said office, and have by force placed the said Parsons in possession of said desk and the paraphernalia of said office, and the said Parsons now claims to have been duly elected to said office, and to be entitled to the salary and emoluments thereof; but plaintiff says he is not entitled to said office or its emoluments, because the said relator's term had not expired, and there is no cause for removing him, and his forcible ejection was without authority of law, and, therefore, void. That the defendant Mitchell is the speaker of the house of representatives of the said twenty-fourth general assembly, and he is about to certify, jointly with the lieutenant governor of Iowa, that the said Parsons has been duly elected to the office

of secretary of said senate, and the defendant J. A. Lyons, auditor of said state, is about to issue warrants to said Parsons for the emoluments of said office, and both of said officers will so do unless restrained by order of this court, and by their so doing plaintiff will suffer great and irreparable injury. That the relator is not only entitled to said salary, but he is also a taxpayer of the said state, and will suffer great and irreparable injury, unless said Speaker Mitchell and Auditor Lyons be restrained from thus aiding and assisting the said Parsons in procuring the emoluments of said office."

The defendant Parsons filed his answer in four counts. In the first he denies every allegation not expressly admitted. The second count is as follows:

"Count 2. Defendant Parsons, further answering, states the facts herein to be as follows: That at the organization of the house of the twenty-fourth general assembly of Iowa his codefendant W. O. Mitchell was elected speaker of the house of representatives, and at said time one Poyneer was lieutenant governor of the state of Iowa; that the relator herein, J. W. Cliff, was a candidate for secretary of the senate of Iowa, and on the fourteenth day of January, 1892, subsequent to the permanent organization, the said Poyneer, on a vote of twenty-four senators, declared the said relator elected secretary of the senate; that at said time twenty-five of the senators voted on the call of the roll for secretary of the senate, there being absent or not voting twenty-five members of the senate; that subsequently, upon the canvass of the vote of the electors of the state of Iowa, the Hon. S. L. Bestow was declared elected lieutenant governor of Iowa, and was duly inaugurated, and entered upon the discharge of his duties as such on the twentieth day of January, 1892; that on the twenty-first day of January, 1892, at two o'clock p. m., the senate met, and

the Hon. S. L. Bestow presiding; that at said time the following proceedings were had in relation to the office of secretary of the senate, and the same were as shown by the journal of the senate, which is as follows, to wit: 'Senator Bolter offered the following resolution: "Resolved by the senate, that J. W. Cliff, now acting as chief secretary of this body, be, and is hereby, relieved from any further duty as such acting secretary, and that he is required and ordered to turn over and deliver to such person as the senate may elect to such office of chief clerk all bills, resolutions, books and records now in said Cliff's possession pertaining to said office of chief clerk of the senate."' And the question being on the adoption of the resolution, twenty-four senators and president of the senate voted in the affirmative, and twenty-four senators voted in the negative, and so the resolution was adopted and declared carried by the lieutenant governor presiding as president of the senate; whereupon the following resolution was introduced by Senator Bolter; 'Resolved, that Samuel N. Parsons, of Linn county, be, and is hereby, elected to the office of permanent [and chief secretary of the Iowa senate during the twenty-fourth general assembly of this state.' The roll being called on the adoption of this resolution, there were twenty-four senators voted in the affirmative, and the roll of the senate being called showed thirty-eight senators present, so the resolution was adopted, and the same was declared adopted by the president of the senate, and Samuel N. Parsons was declared elected permanent secretary of the senate, and immediately appeared at the bar of the senate, and took the oath of office of secretary of the senate, and was duly installed in such office, and entered upon the discharge of his duties as such, and has ever since been, and at present is, engaged in the discharge of his duties as such officer."

In the third count he denies the alleged conspiracy,

and alleges that by reason of the passage of the resolution set out in the second count the relator became divested of all rights to said office, and to any emoluments thereof. The fourth count of the answer is as follows:

"Count 4. The defendant, further answering, says that this court has no jurisdiction to hear, try, and determine this cause, involving as it does the office of the secretary of the senate of Iowa; that by the constitution of Iowa the senate has the right to determine who are its officers, and it has determined that the defendant herein was and is secretary of the Iowa state senate of the twenty-fourth general assembly from and since the twenty-first day of January, 1892; that this suit is brought for the purpose of harassing the defendant, who has performed all the duties pertaining to the said office of secretary of the senate; and that in defending against the injunction issued in this case the defendant has been compelled to go to great expense in employing counsel and making preparations to dissolve the injunction, to wit, in the sum of one hundred dollars (\$100)."

The relator filed a demurrer to the answer as follows: "The plaintiff demurs to the second count of the defendant Parsons' answer, because the facts therein stated do not constitute a defense to the plaintiff's claim, in this: *First*. The said count shows that relator was duly elected to the office of secretary of the senate as a part of its permanent organization, and fails to show that he was lawfully removed from said office, or that there was any vacancy which the senate had power to fill. *Second*. The plaintiff demurs to the fourth count of defendant Parsons' answer, because the facts therein stated do not constitute a defense to plaintiff's claim, in that it is a claim for damages, which has no foundation in law, and can not properly be made in this action."

II. Section 7 of article 3 of the constitution of Iowa is as follows: "Each house shall choose its own officers and judge of the qualifications, election and return of its own members. A contested election shall be determined in such manner as shall be directed by law." Here we have undoubted authority in the senate to choose, in such way as it pleases, its own officers. The law with respect to the removal of subordinate officers is well stated in 19 Am. and Eng. Encyclopedia of Law, p. 562f*, as follows: "In the absence of constitutional provisions or statutory regulations, where the tenure is not fixed by law, and where the office is held at the pleasure of the appointing power, the power, of removal is incident to the power of appointment; and it is well settled in such case that an officer may be removed without notice or hearing. This doctrine applies, however, where the office is held at the pleasure of the appointing power only. Where the tenure of the office is fixed by law, or where the concurrence or consent of a different body or officer is required to the removal, or where the right to removal can be exercised only for specified cause or for cause generally, the appointing power can not arbitrarily remove the officer. And, where the removal is to be had for cause, the power can not be exercised until the officer has been duly notified, and opportunity given him to be heard in his own defense." This statement of the law is well supported in the cases cited in the footnotes, and is not questioned in this case; therefore we deem it unnecessary to make further citations. If nothing further appeared, it would hardly be questioned but that the senate can choose and remove its own officers at pleasure.

The appellant cites and relies upon section 13 of the Code, which is as follows: "The speaker of the house of representatives shall hold his office until the first day of the meeting of a regular session next after

that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected." The appellant contends that by this section the term of office of the secretary of the senate is fixed by law to continue during the session at which he was elected, and therefore that he can not be removed without cause, notice and hearing. It will be observed that the language employed as to these "other officers" is different from that with respect to the speaker, and different from that usually employed in fixing the term of an office. This statute says the speaker "shall hold his office until the first day of the meeting of the regular session next after that of which he was elected," while as to the other officers it is said they "shall hold their offices only during the session at which they were elected." The one fixes a time to which the office shall be held, and that time is the term or tenure of that office; the other does not fix a time to which the office shall be held, but a time beyond which it shall not be held. The employment of this unusual language in this connection is quite significant in arriving at the legislative intention. The word "only" seems to have been purposely used by the two houses in enacting this section in harmony with the constitutional provision that each house shall choose its own officers. Neither house has power to control the other in choosing its officers, nor in fixing their tenure of office, nor has any general assembly power to control the right of either house of any subsequent general assembly in this respect. To say that this section 13 fixes the term of the secretary of the senate to continue during the session is to abridge, by statute, the constitutional powers of the senate to choose its own officers in such manner, and for such time, as it pleases. To say, however, that this statute does not fix a term during which the secretary shall hold his office leaves it in harmony with

the powers conferred on the senate by the constitution. Whether either house might extend the term of officers, other than the speaker, beyond the session at which they were elected, so as to cover any succeeding session of the same general assembly, we do not determine, as that question is not before us. Our conclusions are that no term is fixed by law during which the secretary of the senate shall hold his office, that the power to appoint is exclusively in each senate, that the office is held during the pleasure of the senate appointing, and therefore the senate has power to remove without notice or hearing. **AFFIRMED.**

THE STATE OF IOWA, Appellee, v. PHILIP FARRINGTON, Appellant.

Continuance: ABSENCE OF WITNESSES: SUFFICIENCY OF SHOWING. An application for a continuance on the ground of the absence of witnesses, which fails to show proper diligence on the part of the applicant to obtain the testimony of such witnesses or their presence in court, nor shows reasonable grounds for believing that the attendance or testimony of the witnesses will be procured at the next term of court, should be overruled. (1)

Forgery: EVIDENCE: CROSS-EXAMINATION. Where, upon the trial of an indictment for the forgery of an indorsement upon a draft, made to the order of P., the cashier of the bank, which sold the draft to P., having testified, on behalf of the state, to the facts attending the purchase, *held*, that the defendant was not entitled to show, on cross-examination of the witness, that about a week or ten days after the purchase P. ordered payment on said draft stopped. (2)

SAME: PROOF OF HANDWRITING: COMPETENCY OF WITNESS. One who has known another for twenty years, is acquainted with his handwriting, and has seen him write, is competent to testify whether a given writing is in his handwriting. (3)

SAME: STANDARD FOR COMPARISON. The signature of one in a hotel register, made about the time of the writing in controversy, and shown to be genuine, may be used as a standard for comparison, in proof of handwriting. (4)

90	673
101	368
90	673
108	110
90	673
122	82
90	673
124	210
90	673
128	224
128	225
90	673
137	431

SAME. The signature to a motion for a continuance in a prosecution for forgery, purporting to be that of the defendant, and to which is attached the certificate of the clerk of the court, that the same was subscribed by the defendant in his presence, *held*, to be competent as a standard for comparison in proof of the handwriting of the defendant in such case, without proof that the signature was genuine. (5)

SAME: EVIDENCE FOR PROSECUTION NOT PRODUCED BEFORE GRAND JURY. The introduction of such a writing as a standard for comparison of handwriting is not erroneous under the provisions of section 4421 of the Code, prohibiting the state from introducing any witness who was not examined before the grand jury, except upon certain conditions. (6)

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

WEDNESDAY, JANUARY 24, 1894.

THE defendant was indicted, convicted, and sentenced for the crime of forgery, and appeals.—*Affirmed.*

J. W. Jamison and *W. P. Wolf* for appellant.

John Y. Stone, Attorney General, *Thos. A. Cheshire*, and *F. O. Ellison*, County Attorney, for the state.

KINNE, J.—The charging part of the indictment in this case is:

“Philip Farrington, at and within said county, and before the finding of this indictment, to wit, on the twenty-fourth day of February, did have in his custody and possession a certain bill of exchange or draft, which said bill of exchange was and is as follows, that is to say:

‘\$780.00. First National Bank, No. 64,813.

‘TIPTON, IOWA, 1-10-1890.

‘Pay to the order of Philip Pfarr (\$780.00) seven hundred eighty dollars. To Hide and Leather National Bank, Chicago, Ill.

‘C. W. HAWLEY, Cashier.’

And on the back of said bill of exchange was then and there written a certain forged indorsement of the said bill of exchange, which said forged indorsement is as follows, that is to say: 'Philip Pfarr;' he, the said Philip Farrington, well knowing the said indorsement to be forged, on the day and year last aforesaid, in the county aforesaid, willfully and feloniously did utter and dispose of, and publish as true, the said indorsement of the said bill of exchange, so indorsed, with intent then and there to defraud one E. E. Snyder, contrary to and in violation of law."

To this indictment, defendant pleaded not guilty.

I. It is contended that the court erred in overruling the defendant's motion for a continuance. This motion was based upon the absence of one Bardwell, a resident of Colorado; one Eaton, a resident of Wilton Junction, Iowa, and Louisa Kalb, a resident of Crawford county, Iowa. As to the witness Bardwell, it is shown that the defendant knew he was a resident of the state of Colorado; that prior to March 1, 1891, Bardwell had informed the defendant that he would be in Tipton about the latter date, and would remain there until April, 1891; that the defendant had intended to take his deposition, but, on learning that he was coming to Tipton, did not do so. A subpoena was issued for this witness, but when, it does not appear. Eaton is also said to be a material witness for the defendant. It seems a subpoena was issued for him, but the record before us fails to show when it was done. Louisa Kalb lives beyond the reach of a subpoena. She had been in Cedar county for three months, and, it is averred, expected to remain until after the March term of the Jones district court for 1891, but was called home, and, though expecting to return, has not done so.

Even if it be conceded that the proposed testimony of these three witnesses is material and competent, still the court did not err in its ruling. This record discloses

the fact that this case had been tried once before; that the defendant was arrested about a year prior to the last trial. It must be presumed, then, in the absence of a showing to the contrary, that the defendant was fully conversant with the witnesses he would need on the trial for a sufficient length of time to have taken their depositions, or, if within the reach of a subpoena, to have had it served in due time. There is no sufficient excuse offered for failing to take the deposition of any of these parties. There is no diligence shown in attempting to secure these witnesses, or their depositions. No effort was ever made to take Eaton's deposition, nor does it appear when the subpoena was issued for him. Louisa Kalb, in fact, stayed in Cedar county until a week before this application was filed, and then went home, to Crawford county. It does not appear when the subpoena was issued for her. The facts show negligence on part of the defendant in not securing this evidence. Again, the application does not conform to the requirements of the statute, in this: that it fails to state facts and show reasonable grounds for believing that the attendance or testimony of the witnesses will be procured at the next term of court, and this the statute requires. Code, section 2750. The motion was properly overruled.

II. Hawley, the cashier of the bank that sold the draft to Jacob Pfarr, the indorsement of which it is claimed was forged, was asked as to the facts surrounding the purchase. On cross-examination the defendant attempted to show by the witness that, a week or ten days after the purchase of the draft, Jacob Pfarr went to the bank and ordered payment on said draft stopped. This was clearly not cross-examination. The witness had not been interrogated on his examination in chief as to the matters sought to be shown on cross-examination. The ruling of the court was therefore correct.

III. N. B. Anthony, a witness for the state, testified that he had lived in Stanwood twenty-one years, and was in the mercantile business; that he had known the defendant for twenty years; was somewhat acquainted with his handwriting, having seen him write. He was then asked to look at the signature in controversy, and state whether or not, in his opinion, it was in the defendant's handwriting. The defendant's counsel objected to the question as calling for incompetent testimony. The objection was overruled, and the witness answered, "It looks some like his." The defendant moved to strike the answer because it disclosed that the witness was incompetent to testify upon the subject inquired about, and because the evidence was incompetent. This motion was overruled. The examination then proceeded as follows: "Q. Mr. Anthony, what is your best judgment as to whether that is his handwriting?" Same objection, and overruled. "A. Of course I wouldn't swear that that is his handwriting unless I saw him put it there. Q. No, of course, but what is your best judgment as to its being his handwriting?" To this the same objection was made, and same ruling had. "A. Well, sir, I should think it very similar to his handwriting. Q. But you will have to answer the question, Mr. Anthony." The defendant's counsel moved the court to strike out all the answers of the witness, as being incompetent. The motion was overruled. "Mr. Anthony, I want you to state what is your best judgment as to whether or not that is his handwriting. It is not a question of similarity. A. Well, I should say that it is in his handwriting. It is very similar to his handwriting. But, as to saying that it is positively in his handwriting, I couldn't say that without seeing him write it." Here the motion to strike the answers was renewed and overruled. To all these rulings the defendant at the time excepted.

Having in view the entire examination of this witness, we do not think the court erred in its rulings. The rulings are assailed upon two grounds: *First*, because the witness was not shown to be an expert, and qualified to testify; and, *second*, that the testimony in fact given was incompetent. There can be no question as to his being a competent witness. He had shown that he had been acquainted with the defendant for twenty years; that he was acquainted with his handwriting, and had seen him write. In *Hyde v. Woolfolk*, 1 Iowa, 167, it is held that in such cases the competency of a witness as an expert does not depend upon his having followed a particular calling, but rather "on his means of knowledge as a business man, and his intelligence." Every fact necessary to be established in the first instance to show his competency had been shown. It is now almost the universal rule that one who has seen a party write is competent to give an opinion as to the genuineness of his signature, in a proper case. 1 Greenleaf on Evidence, section 577; *Egan v. Murray*, 80 Iowa, 182; *Succession of Morvant*, 45 La. Ann. 207, 12 South. 349; *State v. Zimmerman*, 27 Pac. (Kan.) 999; *De La Motte's Case*, 21 How. St. Tr. 810; *Miles v. Loomis*, 75 N. Y. 288; *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. Rep. 679; *State v. Gay*, 94 N. C. 814; *State v. Stair*, 87 Mo. 268; *Long v. Little*, 119 Ill. 600, 8 N. E. Rep. 194; *Hopper v. Ashley*, 15 Ala. 457; *Moon v. Crowder*, 72 Ala. 79; *Woodman v. Dana*, 52 Me. 9; *Bank v. Armstrong*, 66 Md. 113, 6 Atl. Rep. 584; Rogers on Expert Testimony [2 Ed.], sec. 122. All the answers of the witness set out, except the last, were not responsive to the questions asked; and if it should be conceded that they were incompetent—a question we do not find it necessary to decide—and that the court erred in not striking them out, still the error was without prejudice to the defendant. The last answer was both responsive and competent, and it

embraced all and more than was in the prior answers. In no event could the defendant have been prejudiced by the court's rulings.

IV. Elliott testified, as a witness for the state, that he was acquainted with the defendant; that he kept a hotel at Stanwood, Iowa; and that, at various times near the time of the commission of the alleged forgery, the defendant had stopped at his hotel, and he had seen him write his name in the hotel register. The purpose of the testimony was to identify as genuine the signatures of the defendant on this hotel register preliminary to its introduction in evidence. The defendant moved to strike the evidence as incompetent, immaterial, and irrelevant. The motion was overruled, and an exception taken. Counsel's claim is that the hotel register could not be used as a standard of comparison, because it was not relevant or material to any other issue in the case. Whatever may be the rule elsewhere, this court has recognized the right to use, for the purposes of comparison, the defendant's genuine signature, wherever found, if made about the time of the alleged forgery. *Hyde v. Woolfolk*, 1 Iowa, 164; *State v. Calkins*, 73 Iowa, 128. See *Sankey v. Cook*, 82 Iowa, 125. In the *Calkins* case, the writing sought to be proven as a standard was, as in the case at bar, a signature of the defendant in a hotel register, which was proven to be his signature by one who saw him write it, and it was held proper. What we have said in this division of the opinion applies also to the defendant's exceptions to the admission of the testimony of Mershon, identifying a check presented to Mershon, with the defendant's name indorsed thereon.

V. It appears that on March 13, 1891, and preceding the commencement of the trial below, the defendant filed a motion for a continuance. It purported to be signed by him, and below his signature was the following: "Subscribed in my presence, and

sworn to before me, by Philip Farrington, this thirteenth day of March, 1891. R. M. Bush, Clerk." Witness Hawley, being recalled, and shown to be competent to testify as an expert, said he had never had any correspondence with the defendant, and had never seen him write. The state then offered in evidence the signature of the defendant to his showing for a continuance. It was objected to as incompetent as a standard of comparison, as there was no evidence that the signature offered was written by the defendant, and, further, because no notice had been given the defendant that such a paper would be offered in support of the indictment, and the same was not before the grand jury. The objections were overruled, and the signature admitted as genuine, and was thereafter used by the state as one of the standard writings for the purpose of comparison, all against the defendant's objection. Our statute provides that "evidence respecting handwriting may be given by comparison made by experts, or by the jury, with writings of the same person which are proved to be genuine." Code, section 3655. It was held in *Hyde v. Woolfolk*, 1 Iowa, 162, that there were two methods of proving the standard writing: *First*, by the testimony of a witness who saw the party write; and, *second*, by the party's own admission, when not offered by himself. It was also said that there might be other ways of proving the genuineness of the standard writing. The statute is absolute in its requirement that the genuineness of the standard writing must be established, but makes no provision as to how it shall be done. Here the defendant, for a legitimate purpose, attaches his signature to a paper which he finds necessary or desirable to file in the case. It is filed, and becomes a part of the record in the case. The defendant's name purports to be signed to the paper. The clerk certifies officially that that signature was put there by the defendant, before him, and in his

presence. On the faith of such a showing, and the genuineness of the defendant's signature thereto, and in reliance thereon, the court is asked to grant him a continuance. He has thereby most solemnly said to the court, in the very case on trial, that his signature to that paper is genuine. The case is not like *Hyde v. Woolfolk*, *supra*, for in that case the acknowledgment did not show that the signature was his own, while in the case at bar his signature was made in the presence of the officer, and it was adopted as the defendant's by him in attempting to secure a continuance on the strength of the showing made, and which was necessarily signed by him. Surely, where one signs his name to a paper, which he voluntarily makes a part of the record in the case, and upon which he invokes the action of the court, he must be held, in that case, at least, to be estopped from thereafter questioning the genuineness of his signature to such paper. As supporting this doctrine, see *Moore v. United States*, 91 U. S. 270; *Wilber v. Eicholtz*, 5 Col. 240; *Vinton v. Peck*, 14 Mich. 287.

VI. Our statute provides, in substance, that in support of the indictment the state can not introduce any witness who was not examined before the grand jury, and the minutes of whose testimony were not taken by the clerk of the grand jury, and presented with the indictment to the court, unless the county attorney shall have given the defendant four day's notice, in writing, before the commencement of the trial. And if the county attorney desires to introduce such evidence, and has not given the notice for want of time since he learned that the evidence could be obtained, he may move the court for leave to introduce it; and, if the court sustains the motion, the defendant must elect whether the cause shall be continued on his motion, or the trial proceed, and the evidence be introduced. Code, section 4421. This evidence was not

before the grand jury, no notice was given the defendant that it would be produced in support of the indictment, and no motion was made by the county attorney, as the statute provides. The provision of the statute is, as we have seen, that no witness can be examined in support of the indictment by the state, unless he was examined before the grand jury, or unless notice is given. Now is the offered signature a witness within the language and intent of the statute? We think not. The word "witness," as used in the statute, evidently refers to a person, not to an inanimate object or thing. See Bouvier's Law Dict., tit. "Witness;" Webster's Dict., tit. "Witness." We are not warranted in extending the provision of the statute so as to cover a kind of evidence not mentioned therein. We discover no error in admitting the signature in evidence.

VII. It is said that the verdict is not sustained by the evidence. We do not feel called upon to discuss the evidence in detail. We think it fully justified the jury in finding defendant guilty. His explanation of the means by which he came into possession of the draft was exceedingly unsatisfactory and wholly improbable. His conduct and conversation after he knew that the draft was claimed to be the property of another was not that of an innocent man. We have no doubt, from the record before us, of the defendant's guilt.

After a patient examination of the entire record, and the consideration of all errors assigned, we discover no reason for disturbing the verdict. **AFFIRMED.**

**JAMES L. LOMBARD, Appellant, v. CARRIE GREGORY
et al., Appellees.**

Sale of Real Estate on Execution: APPEAL: REDEMPTION. Where a defendant appeals from a judgment wherein there is a sale of real estate on execution, and the judgment is reversed, he will not be entitled to redeem from a sale subsequently made under a modified decree.

Appeal from Montgomery District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, JANUARY 25, 1894.

ACTION for the foreclosure of a mortgage on real estate. From a decree for the plaintiff the defendant appealed, and the decree was reversed. A modified decree was thereafter entered by the district court, ordering a sale of the property subject to the right of redemption, and the plaintiff appeals.—*Reversed.*

D. H. Ettien and *S. McPherson* for appellant.

No appearance for appellees.

KINNE, J.—In this case a mortgage was foreclosed upon certain real estate, and a decree entered, ordering the sale of the mortgaged property under special execution. Sale was had, and the plaintiff became the purchaser. After the sale, the defendants appealed, but filed no supersedeas bond. This court reversed the decision of the lower court, found the amount which the plaintiff was entitled to recover, and ordered a decree entered in the district court foreclosing the mortgage for said sum. 47 N. W. Rep. 298. When the decree which is now appealed from was entered in the district court, it was ordering the sale of the real estate subject to the right of redemption. To this part of the decree, the plaintiff excepted, and appeals therefrom.

It is insisted in this case that the decree should have been entered, ordering the land sold without redemption. This claim is based upon section 3102 of the Code, which reads: "The defendant may redeem real property at any time within one year from the day of sale as herein provided, and will, in the meantime, be entitled to the possession of the property. But in no action where the defendant has taken an appeal from

the district court, or stayed execution on the judgment, shall he be entitled to redeem." In this case the appeal was taken by the defendant from the judgment of the district court, and the judgment and decree reversed by this court; it followed, as a matter of course, that the sale made under said judgment and decree, and prior to the decision of this court, was of no effect. It may be claimed that under such circumstances the limitation on the right to redeem does not apply, inasmuch as the original judgment and decree was set aside, and a new one entered, from which no appeal has been taken. But we can not see how such a theory is consistent with the provision of the statute. It is absolute that in "no action where the defendant has taken an appeal * * * shall he be entitled to redeem." Now, the statute makes no exceptions. The intent of the law was that a defendant who, by appeal, delayed the sale, should not be entitled to avail himself of that delay, and also retain the right of redemption. This is an action; an appeal has once been taken therein by the defendant, and thereby his right of redemption is lost; and the fact that on the appeal the judgment was reversed, it seems to us, is entirely immaterial. This right of redemption is a statutory right, and can be enjoyed only in compliance with the provisions of the statute. In *Dobbins v. Lusch*, 53 Iowa, 308, in construing this section, it is said: "The provisions of this section are so plain that there is no room for construction. The right of redemption is denied, by express provision, in every case where the defendant has appealed." It is true, in that case, the judgment below was affirmed; but, as we have indicated, the application of the law is the same, whether the case is affirmed or reversed on appeal. It is not an affirmance or reversal that is made the test by which we are to determine whether the right of redemption exists, but the limitation on the right of redemption, as provided in the section quoted, becomes

operative whenever an appeal is taken by the defendant. The decree entered by the court below will be so modified as to order a sale of the premises without redemption. REVERSED.

MONTGOMERY COUNTY FARMERS' MUTUAL INSURANCE
COMPANY, Appellee, v. ARMSTEAD MILNER,
Appellant.

Mutual Insurance Companies: LIABILITY OF MEMBERS FOR ASSESSMENTS. A member of a mutual insurance company can not claim exemption from assessment, for payment of losses by the company upon the ground that, under the articles of incorporation, the private property of shareholders is exempt from liability for corporate debts. (1)

SAME: BY-LAWS: POWER TO CHANGE: RIGHTS OF STOCKHOLDER. The by-laws of the plaintiff originally provided that no insurance should be binding, until the amount of property placed upon its books amounted to one hundred thousand dollars. The articles of incorporation provided that the business of the corporation should be conducted by "seven managers," and these were given authority to adopt such rules and by-laws as to them might seem proper. Prior to the issuance of the defendant's policy the by-laws were so changed by the managers that the insurance became binding when the property on its books amounted to fifty thousand dollars, and the defendant in his application agreed to be governed by the by-laws of the association. *Held*, that the managers were the agents of the several members of the corporation, and the members were bound by the acts of such agents in changing said by-law, even though they had no actual notice of such action. (2)

Appeal from Montgomery District Court.—HON. A. B.
THORNELL, Judge.

THURSDAY, JANUARY 25, 1894.

THE plaintiff, a mutual insurance company upon the assessment plan, brings this action at law to recover of the defendant, as a member of said company, an assessment made upon a policy held by him for two thousand, three hundred dollars; said assessment being to pay a judgment in favor of Thomas Weidman, also

a member, for two thousand and twelve dollars, rendered on account of a loss sustained by him under his policy from the plaintiff. The defendant answered, denying liability upon the following grounds: That the plaintiff's articles of incorporation provide that the private property of its members shall be exempt from corporate debts, wherefore said judgment is not binding on the defendant's private property; that the plaintiff's by-laws provided that no insurance should be binding until the amount of property placed upon its books amounted to one hundred thousand dollars, and that the day on which liability should commence on the first one hundred thousand dollars of risk taken by the company should be determined by the executive committee; that there has never been to exceed seventy thousand dollars of risks taken by the company; that it never had authority to assume any risks so as to bind the defendant; that at the time the defendant took his policy he was apprised that private property was exempt from corporate debts, and that the insurance could not take effect until there was one hundred thousand dollars in risks; and that he accepted his policy upon those conditions. He alleges that the judgment in favor of Weidman is fraudulent and void, for that questions of the validity of Weidman's insurance, for the reasons already stated as a defense herein, were not presented as a defense in that case. The jury being waived, the case was tried to the court, and, upon certain findings of facts and conclusions of law made by the court, judgment was entered in favor of the plaintiff for twelve dollars and eighty-five cents and costs, including one dollar and twenty-eight cents attorney's fee. The defendant appeals.—*Affirmed*.

F. M. Davis and *C. E. Richards* for appellant.

No appearance for appellee.

GIVEN, J.—I. The only question for us to determine is whether there is error in the conclusions of law announced by the court as applied to the facts of the case. The court found that the exemption of the private property of the members from corporate debts “does not apply to assessments against the members for losses under policies issued by this company, as such assessment is a debt of the individual stockholder, and not of the company.” This conclusion is unquestionably correct. It is not the company that owes the assessment sought to be recovered but the defendant. It does not make his liability a corporate debt, that the assessment may go to the payment of such a debt.

II. The articles of incorporation provide that “there shall be seven managers to conduct said business.” The court found “that, as managers of said company, they were the agents of each person who, by applying for insurance, became a member thereof; and such person was bound by the acts of his agents in changing said by-laws, even though he had no actual notice of such change.” In the defendant’s application for his policy, he agreed as follows: “I hereby agree to pay all just assessments, and be governed in all cases by the by-laws of the association. In case it becomes necessary to collect assessments by law, I agree to pay a reasonable attorney’s fee.” By this agreement the defendant bound himself to be governed in all cases by the by-laws of the association. The articles of incorporation authorized the managers to “adopt such rules and by-laws as to them may seem proper.” In pursuance of this authority, they did, on May 15, 1886, which was prior to the issuing of defendant’s policy, amend the by-laws so as to provide as follows: “No insurance shall be binding until the amount of property placed on the books of the company amounts to

fifty thousand dollars." They directed, "as that amount was on hand in signed applications, the secretary was instructed to issue policies on all signed applications." In view of these provisions, and the agreement of the defendant, and the nature and character of the organization of the company, the conclusion of the court as stated is certainly correct. The further conclusion of law that only one half of one per cent. on the amount of the defendant's policy could be recovered during any one year is in exact accordance with the articles of incorporation.

III. There was certainly no fraud in the company's not making the defenses here set up against the claim of Weidman. His policy was issued upon the same kind of application as the defendant's, and his contract of insurance was in all respects the same. We think the defenses are not available to this defendant, and certainly would not have been available to the company as against the claim of Weidman.

The questions we have considered are discussed under several heads, and in various phrases, by the appellant; but the law of the case is fully embraced in the four conclusions announced by the lower court, and these conclusions, we think, as applied to the facts, are without error. The judgment of the district court is therefore **AFFIRMED**.

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WM. M. SCOTT, Appellee, v. DARBY COAL COMPANY,
Appellant.

Master and Servant: DEFECTIVE APPLIANCES: NEGLIGENCE OF FELLOW SERVANT: WAIVER. In an action by an employee against his employer to recover damages for a personal injury alleged to have been sustained through the defective character of the machinery used and its negligent operation by a coemployee, the court instructed the jury that if they found that the plaintiff knew of the alleged defect in the machinery and of the incompetency of the fellow servant causing the injury, and remained in such employment without protest, and without inducement, or promise that the defect in the machinery should be remedied, he would be held to have waived all objection to the defective machinery and to the incompetency of his fellow servant. *Held*, that said instructions were the law of the case, and, it appearing from the evidence that the plaintiff had such knowledge, and that he made no complaint, a judgment in his favor should be reversed.

Appeal from Appanoose District Court.—HON. W. I. BABB, Judge.

FRIDAY, JANUARY 26, 1894.

ACTION for personal injuries in a coal shaft. There was a judgment for the plaintiff, and the defendant appealed.—*Reversed*.

T. M. Fee and *McElroy & Roberts* for appellant.

Geo. D. Porter for appellee.

GRANGER, C. J.—In September, 1891, the plaintiff was in the employ of the defendant company, as a carpenter, and was engaged in shingling the sides of a shaft. For this purpose he was on the top of a cage that was operated up and down by an engine in charge of an engineer. When the plaintiff desired the cage

moved, he would give the engineer directions whether up or down, and the distance. On the day of the injury for which this action is brought, the plaintiff directed the engineer to lower the cage about three feet. In the attempt to lower the cage, it was first moved upward some eighteen inches or two feet, and then downward. By the upward movement, plaintiff's knee was caught in the mid wall, the leg broken, and so injured that amputation is likely to follow. The injury is charged as the result of negligence on the part of the company, and the plaintiff obtained a verdict and judgment. The appellant asks a reversal of the case on the ground that the evidence shows that the company was not negligent. The averments of negligence are, *first*, that the engineer raised, instead of lowering, the cage, as directed; *second*, that the company was negligent in employing an incompetent engineer; *third*, that the engine was not of the kind required for such work.

The court below eliminated, in the submission of the cause, the charge as to negligence in raising, instead of lowering, the cage, as directed, and submitted the questions only of negligence in the employment of an incompetent engineer, and in using an engine not suitable for the work. The record shows that two kinds of engines are used for hoisting purposes in coal shafts, single and double, and that the latter is the better engine. The single engine was the one in use by the defendant. In using the single engine, there are two points in each of the revolutions, known as "dead points" or "dead centers," at each of which the steam power is lost, and these two points are when the piston rod is furthest out or furthest in. The office of the fly wheel is, by the motion it has acquired after the engine is in operation, to carry the rod past this center to where the motive power again becomes effective. If the engine is stopped with the rod exactly at or over

this dead center, it can not be set in motion by the steam power, and some other power, as the hand, must be applied to turn it past. If the engine is stopped when the rod is not at the center, but so near it that the fly wheel does not, before the rod reaches the center, acquire sufficient velocity to carry it past, then a way to start it by steam, in the desired direction, is to first reverse or turn it back to a point so that, in going forward, the fly wheel will acquire enough force to carry the rod past the center; and, when once in motion, no further difficulty is experienced. At the time the plaintiff gave the direction to lower the cage three feet, the position of the engine was that last described; and the engineer, observing the method above indicated, reversed the engine, to get the necessary motion to go the other way. The effect of this reversing the engine was to carry the cage upward a short distance, by which the plaintiff was caught against the side of the shaft, and injured. With the double engine, this difficulty in starting is not experienced, and no upward movement of the cage would have been necessary, before dropping it to the desired point. The appellee places great reliance on the fact of this difference between the two engines, and that the double engine was the better one, as showing negligence. We may say that we do not concur in the view of the appellee that the defendant was negligent in the use of the single engine, merely because a better one was obtainable; but it is unnecessary to discuss the question, as the cause must be reversed on other considerations.

The court gave the jury the following instructions: "9. If the defects in the machinery, which result in an injury to an employee, are known to him, or are discoverable by him, in the exercise of ordinary care, and he remains in such employment without protest and without inducement, or promise that the defect shall be remedied, he will be presumed to have waived his objection to

such defects, and in such case he can not recover for any injury resulting from same. In this case, if you find that the engine in question was defective, and was not a proper engine to be used in hoisting and lowering the cage at defendant's coal mine shaft, and further find that the plaintiff knew such fact, or that its defects were so observable that, in the exercise of ordinary care, he should have known them, prior to the alleged injury, then he could not recover upon the ground of negligence of defendant in using such engine, if he remained in the employ of defendant, without objection or protest, after such knowledge, or after the time when, in the exercise of ordinary care, he should have known it.

10. The same rule will apply to the employment by defendant of an incompetent engineer. If you find that the defendant was guilty of negligence in the employment of an incompetent engineer, and further find that the plaintiff knew, or that it was so apparent that in the exercise of ordinary care he should have known, of his incompetency, before the time of the injury, and made no objection to him, and remained in the employment of defendant after such time, then he will be deemed to have waived it, and he can not recover in that event, on account of the incompetency of the engineer."

These instructions are the law of this case, and a rule is given whereby, under a given state of facts as to each charge of negligence, there can be no recovery; and the undisputed facts bring the plaintiff within the rule so clearly that we think, in view of the rule given, the court could have, in terms, instructed against a recovery. No person was more familiar with the facts and situation of which complaint is made than was the plaintiff. He was as familiar as any person could well be with what he called the defect in the engine, that is, the reason, now urged, why it was not suitable for the

work, and he was particularly familiar with the methods of the engineer in operating it. He says: "Haley became engineer between the fifth and fifteenth of August, just after the engine was set up. I got acquainted with him the last of June, when I went there to get a job. We worked together, setting up the engine and other work, right straight along. He was the engineer and I was the carpenter, both in the employ of the defending coal company. He operated the engine right up to the time of the injury, and I was right around him there while he was operating it. Part of the time, I was away from him. I saw him operating it a great many times every day, or almost every day. Some days, I did not see him from morning until noon. I never made any complaint to Mr. Williams, or anybody else, about Haley managing the engine." Again he says: "*Question.* He seemed to operate the engine just as good as anybody, didn't he? *Answer.* Just about the same. *Question.* You couldn't see but that he could operate that engine just as good as anybody could operate a single engine. *Answer.* No, I could see that he could not. *Question.* You could see that he could not? *Answer.* Yes, sir. *Question.* In what way? What seemed the trouble? *Answer.* Why, I have seen a single engine operated that was operated a great deal better than that one was. *Question.* What seemed to be the trouble in his manner of operating that engine? *Answer.* It was getting it on the center. *Question.* Your idea is that you have seen engineers who could keep it off center better than he could? *Answer.* Yes, sir. *Question.* You noticed this during that month before the accident, did you? *Answer.* Yes, sir. *Question.* Frequently, every day? *Answer.* Oh, no; I could not say I did every day. *Question.* Your idea is, you say, that during that time you saw that he was not able to operate that engine, and keep it off center, as good as some other engineers you have

seen operating a single engine? *Answer.* Well, I have seen others operating a single engine that operate it better than that one was. *Question.* That was all before the accident, was it? *Answer.* Yes, sir. *Question.* All these engines you are talking about seeing operated was before this accident? *Answer.* Yes, sir. *Question.* Now, the only thing you say of this engineer is that you knew of other engineers doing better than he was in keeping the engine off center. You think you have seen other engineers that kept it off center better than he could. *Answer.* I do not know whether it was in the engine or in the engineer. I had seen other single engines that were kept off center better than that one. *Question.* You don't know whether it was the fault of the engineer or the engine itself? *Answer.* No, sir. *Question.* Was that the only fault you had to find with the engineer or with the engine, this trouble about keeping it off center? *Answer.* That is the only trouble that I knew of. *Question.* The only trouble that you had found, or objection that you found, to this single engine, was the trouble of keeping it off center? *Answer.* I say I don't know whether it was in the engineer or in the engine. I have seen them that was kept off better. *Question.* Do you know any other objection to the engineer, except that one? *Answer.* That is the main objection. *Question.* But, if you found any objection at all to the engineer himself, it would be on that ground, would it? *Answer.* Yes, sir. *Question.* That is right? *Answer.* Yes, sir. *Question.* That was all known to you some time before the accident, was it? *Answer.* Yes, sir." From this testimony it conclusively appears that but a single complaint was made as to the engine, that it would get "on center," and only one complaint as to the engineer, and that is that he didn't keep it "off center" as well as some other engineers. With both of these facts he was entirely familiar before the injury, and made no complaint. Nothing in the record

presents a conflict as to these facts, nor is there a pretense that reasons exist that would excuse his remaining in the defendant's employ after knowledge of such facts. The conclusion is so obvious that we do not know how to enlarge upon it, nor is it necessary. The defendant, under the instructions and the facts, was entitled to the verdict.

To avoid the waiver as to which the court instructed, the appellee urges that it was not pleaded, and he says, "This fact ends the case." Without intimating that the pleadings are defective in this respect, it is only necessary for us to say that the instructions, without objections by either party, present the rule as applicable to the issues, and the jury could not properly disregard it. As we have said, the instructions are the law of the case. These considerations are conclusive on this appeal, and the judgment is REVERSED.

JAMES A. LEE, Appellee, v. WM. RICHMOND *et al.*,
Appellants.

Deed: DELIVERY ON CONDITION: NONPERFORMANCE: RELIEF. Where a deed to real estate was executed and delivered by a father upon condition that a criminal prosecution instituted by the grantee against the grantor's son should be stopped, but such proceedings were not stopped as agreed, *held*, that there was no delivery of the deed, and the grantor was entitled to have the same canceled in equity.

Appeal from Cass District Court.—HON. N. W. MACY,
Judge.

FRIDAY, JANUARY 26, 1894.

ACTION in equity for the cancellation of a conveyance of real estate. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendants appeal.—*Affirmed.*

Geo. A. Holmes and L. L. De Lano for appellants.

J. F. Smith for appellee.

ROBINSON, J.—The defendants, William Richmond and George W. Fulton, for some years carried on a commercial business at Council Bluffs under the name of the Boston Tea Company. James T. Lee, a son of the plaintiff, was employed by them as clerk for about three years. In July, 1888, and while he was so employed, the defendants caused him to be arrested on a preliminary information which charged him with the crime of embezzlement. While he was under arrest, and before the examination was held, he had an interview with Richmond, in which he admitted that he was guilty of the offense charged, but expressed a desire to settle the matter, and agreed to telegraph to his father, who resided at Keokuk, to come to Council Bluffs. On the next day, Saturday, July 14, he learned that his father could not come, and informed Richmond of the fact. On Sunday, the defendants visited him at his home, and spent several hours there. On the same day, Richmond, James T. Lee, and his wife started for the home of the plaintiff, where they arrived Monday. An interview was there had, at which the plaintiff and his wife, the son and his wife, and Richmond were present during all or a part of the time. It resulted in the execution by the plaintiff and his wife to Richmond of a deed for three lots in the town of Atlantic for the specified consideration of two thousand dollars. The deed was given to Richmond, and was recorded in the office of the recorder of Cass county. The plaintiff asks that the deed be canceled, and for general equitable relief. The district court decreed the deed to be void, and that the title to the lots was vested in the plaintiff.

The plaintiff alleges that the deed was executed in consequence of the representations of Richmond, for himself and Fulton, that James T. Lee had embezzled a large sum of money; that they had filed an informa-

tion against him, in which he was charged with the embezzlement of money and goods to the value of five thousand dollars; that the embezzlement had been confessed by him; that the defendants were his friends, and that for the sum of three thousand dollars they would dismiss the information, and restore him to his employment, and he would have no further trouble; that, if the sum of three thousand dollars was not paid at once, the prosecution would be carried on, and he would be sent to the penitentiary. The plaintiff further claims that at that time he and his wife, who is the mother of James T. Lee, were old and feeble; that he was sick; that both were much disturbed and frightened by what was said to them, and not knowing the facts, and having no knowledge of such matters, they believed what Richmond said to them; that, when the deed was executed, Richmond agreed to submit it to Fulton, and, if it was not satisfactory to him, to return it to plaintiff, but that, if it was satisfactory, the criminal prosecution of his son would be dropped and ended. Some of these claims are denied by the defendants, but the preponderance of the evidence shows the following facts: Until James T. Lee and wife and Richmond arrived at the house of the plaintiff, he did not know of the charges against his son. He was then about seventy years of age, had been in poor health for several years, and was confined to the house. He was subject to attacks of nervousness, and had been suffering from one for several days. Richmond told him that the amount of the embezzlement was six thousand dollars, but the defendants would drop the prosecution for three thousand dollars; that the preliminary hearing was set for the next day, and would be prosecuted, unless a settlement was effected. The son was present, but did not deny the charge of embezzlement which Richmond made. The father and mother were much frightened, and desiring to protect their son, and

avoid the scandal of a criminal prosecution, finally consented to give the deed in question, if it would end the prosecution, and, with notes of the defendants to the amount of about nine hundred dollars, which the son held and proposed to surrender, would effect a complete settlement of the matter in controversy. The deed was delivered under an agreement to that effect, and on condition that, if it was not satisfactory to Fulton, it was to be returned to the plaintiff. The notes held by the son were surrendered to the defendants, but the prosecution of the son was not stopped, although after the case reached the district court, and after an indictment had been returned, it was dismissed on motion of the county attorney for want of sufficient evidence to convict. The deed was retained by the defendants, but they insisted that the plaintiff should give his promissory notes for the sum of one thousand dollars, which were sent to him repeatedly for his signature.

It is said that, if the claims of the plaintiff be well founded, he conveyed his property for the purpose of compromising a criminal prosecution, and that, as that object was illegal, the law will leave all parties to the transaction where it finds them. We should hesitate long before refusing the plaintiff relief on that ground, in view of the weakness of his body and mind, the threats made, and the fear he was under when the deed was given. *Meech v. Lee*, 46 N. W. Rep. (Mich.) 397. But we prefer to place our conclusion upon the ground that the condition on which the deed was given to Richmond was never complied with, and that the deed was not in law delivered, and, therefore, has not taken effect as a conveyance. We refer to the condition that the deed and the notes surrendered by the son should be received in full settlement of the claims made against the son by the defendants. Conceding that some of the provisions of the agreement were illegal, yet the deed was not to be regarded as delivered, unless the

settlement attempted was approved by Fulton, and, as it was not approved by him, there was never, in law, any delivery, and the deed is without effect. *Steel v. Miller*, 40 Iowa, 406; *Bershire v. Peterson*, 83 Iowa, 198; *Head v. Thompson*, 77 Iowa, 267; *Deere v. Nelson*, 73 Iowa, 187. The fact that some portions of the agreement were illegal would not operate to annul the conditions and make the delivery complete. Since the deed was never delivered, nothing can be claimed under it. The decree of the district court is in harmony with our conclusions, and is AFFIRMED.

C. W. ROBINSON, Appellant, v. W. W. GRAY, Appellee.

Chattel Mortgage: RIGHT OF MORTGAGEE TO SELL BEFORE DEFAULT.

Under a chattel mortgage authorizing the mortgagee upon default in payment of the mortgage debt, or "whenever said mortgagee or his assigns shall choose so to do," to take possession of the mortgaged property and sell the same at public or private sale, "to pay the amount due or to become due," the mortgagee may seize and sell the mortgaged property before default in the payment of the mortgage debt, or the breaking of any other condition. GIVEN, J., *dissenting*.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

FRIDAY, JANUARY 26, 1894.

THIS is an action upon four promissory notes executed by the defendant, and an account for interest on a balance alleged to be due the plaintiff. The defendant, by his answer, denied indebtedness upon the account, and alleged that the promissory notes were fully paid by the seizure of certain property rights and credits of defendant under a chattel mortgage given to secure the payment of said notes. In another count of the answer the defendant alleges that the plaintiff maliciously and wrongfully seized, and converted to his own use, the property described in the chattel

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mortgage, by reason of which wrongful acts the defendant was damaged in the sum of two thousand dollars actual damages, and one thousand dollars exemplary damages. The action was aided by an attachment, which was based upon the grounds that the defendant was about to dispose of his property with intent to defraud his creditors, and that the debt sued on was incurred for property obtained under false pretenses. The writ of attachment was levied upon certain real estate of the defendant. A levy was also made upon certain personal property. The defendant, by way of counterclaim, averred that the grounds upon which the attachment was procured were false, and that the plaintiff had no reasonable grounds for believing them to be true, but knew the same to be false and untrue, and that the same were made willfully and maliciously, by reason of which the defendant was damaged in the sum of two thousand dollars actual, and three thousand dollars exemplary, damages, for which judgment was demanded. This counterclaim was denied by the plaintiff. The cause was tried to a jury, and a verdict was returned for the defendant for five hundred and twenty-eight dollars and forty-eight cents. It was found specially by the jury that the attachment was wrongfully and maliciously sued out, and the seizure and sale of the property under the chattel mortgage was wrongful, and an allowance was made in the sum of five hundred and eleven dollars for damages for the wrongful suing out of the attachment. The plaintiff appeals.—*Reversed.*

Blake & Mitchell and *Frank Farrell* for appellant.

Yeoman & Kenyon for appellee.

ROTHROCK, J.—I. The matter of account involved in the controversy consisted of claimed balances due upon accounts of the plaintiff against the defendant. The

court instructed the jury that there was no evidence authorizing a recovery of the interest claimed. It is insisted that this instruction was erroneous. An examination of the evidence satisfies us that the instruction of the court as to this item of the claim was correct.

II. It appears from the evidence that the plaintiff is a wholesale lumber dealer, and that the defendant was for several years a retail dealer in that line at Lehigh, in Webster county, and that he made the principal part of his purchases of lumber from the plaintiff on credit. He did not make prompt payments for his purchases, and at times his indebtedness to the plaintiff amounted to considerable sums. On the eleventh day of June, 1891, the defendant executed to plaintiff the four promissory notes upon which the suit is founded. The aggregate amount of the notes was one thousand, three hundred and sixty-eight dollars. The first of said notes was made payable in thirty days, the next on the ninth day of September, the next on the ninth day of October, and the last on the eighth day of November, in the same year. The mortgage given to secure the payment of the notes was executed on the same day. The property mortgaged consisted of all of defendant's stock of lumber, and his books of account, and the accounts contained in said books, and all notes taken in settlement of said accounts. The mortgage was recorded on the twelfth day of June, and on the next day it was placed in the hands of the sheriff of Webster county for foreclosure. The said sheriff took possession of the property, and sold the same at public sale, as provided in the mortgage. The sale under the mortgage was made on the third day of July, 1891, before any of the notes became due. It is claimed by counsel for the appellee that there was no authority given in the mortgage to foreclose the same

before it became due, and the court instructed the jury on this question as follows:

"It is conceded on the trial that on the eleventh day of June, 1891, defendant gave plaintiff his four promissory notes sued upon, which said notes were made payable at various dates in the future, from July 11 to November 8, 1891, and that, to secure the payment of said notes, defendant then and there made and delivered to plaintiff a chattel mortgage upon certain personal property, rights, and credits. It is also conceded that immediately or very soon after the giving of said mortgage, plaintiff proceeded to take possession of said property described therein, and to offer the same for sale, and did in fact make public sale of said property on the third day of July, 1891. Upon these admitted facts you are instructed that, under the terms of the mortgage given by the defendant, plaintiff had the right to take possession of the mortgaged property at any time he chose so to do, and no damages can be assessed against him in this action for such taking. He did not, however, have any legal right to sell said property before the debt secured thereby became due, and by such sale he became and is liable to account to defendant for the fair and reasonable value of the property so sold, without regard to the amount for which the sale was made."

That part of the mortgage which provides for its foreclosure is as follows: "And I, the said W. W. Gray, do hereby covenant and agree with the said C. W. Robinson that in case of default made in payment of the above mentioned promissory notes, or any part thereof, either principal or interest, and all taxes assessed against said property before any part thereof becomes delinquent, or in case of my attempting to dispose of, or remove from said county of Webster, the aforesaid goods, and chattels, or any part thereof, or

whenever the said mortgagee or his assigns shall choose so to do, then, and in that case, it shall be lawful for the said mortgagee or his assigns, by himself, or agent, or any officer, to take immediate possession of said goods and chattels wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due, as the case may be, with all interest and taxes, costs, charges, expenses, and attorney's fees pertaining to the taking, keeping, advertising, and selling said property and the collection of this debt." The instructions above quoted were evidently given in reliance upon the case of *Bank v. Taylor*, 67 Iowa, 572. The language employed in the mortgage which was construed in that case was somewhat similar to the provisions of the mortgage in the case at bar. It was held in that case, because the mortgage provided "that in case of failure to pay the amount due hereon at maturity, or whenever the holder hereof may deem himself insecure, then he may take said property by virtue of this mortgage, and sell the same at public auction, * * * and the proceeds of said sale to be applied on said note," that "this provision, standing alone, would doubtless empower both the seizure and sale of the property before the maturity of the debt, if the holder considered himself insecure." But it was further held that said clause in the mortgage should be construed with another condition of the instrument, which was as follows: "That, if this note and mortgage shall be paid on or before the maturity thereof, then this mortgage to be void," and the conclusion was reached that under the stipulation of the mortgage in that case the mortgagee had the right to take possession of the property before the debt became due, but that, if he considered himself insecure, he had not the right to sell the same to pay the debt

before the debt became due. It will be seen, from an examination of that part of the mortgage in the case at bar, that the provisions thereof are not the same as those in the cited case. In this case it is provided that the mortgagee may take possession of the mortgaged property whenever he "shall choose so to do." It may be conceded that this right or option to take possession of the property is not materially different from the mortgage in the cited case, which was an option to the mortgagee to take possession when "he may deem himself insecure." In both cases there is an absolute right to take possession of the property under the stipulations named. But in the case at bar there is the further provision that, after seizing the property, the mortgagee may "sell the same at public or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due, as the case may be." How could it be possible to make a sale of the property, and pay the amount to become due, unless the sale was made before the amount becomes due? The authority given to sell as plainly provides that a sale may be had before the amount becomes due as if it had been so stated in exact language. There is no room for construction, as in the case of *Bank of Carroll v. Taylor*, 67 Iowa, 472.

In the case of *Wells v. Chapman*, 59 Iowa, 658, where the provisions of the mortgage as to the right to take possession of the property and sell the same were, in substance, like the mortgage in the case at bar, it was said that "under this stipulation the mortgagee had the right, whenever he should 'choose so to do' to take possession of the property, and foreclose the mortgage, whether the debt was due or not." It may be conceded that in that case the mortgagee did not take possession of the property, and sell it before the debt became due; but his right to do so was fairly involved in the question determined. In *Richardson v.*

Coffman, 87 Iowa, 121, this court followed the rule announced in the case of *Wells v. Chapman*, *supra*. In the case of *Richardson v. Coffman*, it appears that the mortgagee took possession of the property, and sold it, before the debt secured by the mortgage became due. Whatever may be thought now of the correctness of the rule in the case of *Bank of Carroll v. Taylor*, it appears to us very plain that it ought not to be applied in construing a mortgage which plainly provided, not only for possession, but for a sale, of the property, before the maturity of the debt. The consequences of holding that there may be possession, but no sale, are apparent. If the mortgage in such case be upon live stock, and the debt has a long time to run before maturity, such a procedure would be ruinous to the security, and a loss to both parties.

We discover no other error in the case. For the error above pointed out, the judgment of the district court is REVERSED.

GIVEN, J. (*dissenting*.)—I do not concur in the conclusion that the appellant had a right to sell the mortgaged property before the condition upon which it was conveyed was broken. The conveyance is upon the express condition that if the appellant paid each of the four promissory notes on or before maturity, and taxes before delinquent, the conveyance should be void. By the notes, time was given extending over several months, for the payment of the debt, and, by the mortgage, the appellee conveyed his property as security upon the condition named. To permit the appellant to sell the property, and apply the proceeds to the payment of the debt before due, is to deny to the appellee the time given him in which to pay the debt, and the privilege reserved to him in the contract, to redeem his property from the pledge by paying the debt at maturity.

The conclusion of the majority is based upon that clause in the mortgage providing that, whenever the mortgagee "shall choose so to do," he might take possession of the mortgaged property, and sell the same, "or so much thereof as shall be sufficient to pay the amount due or to become due." The conclusion is that this authorized the appellant to take possession of and to sell the property before default was made in paying the debt or taxes. The right to take possession is not questioned. That right is clear, under section 1927 of the Code, which provides that, in the absence of stipulation to the contrary, the mortgagee is entitled to possession. To take possession did not deprive the appellee of the time given for payment, nor of the right to redeem by payment at maturity. The fact that possession, and not sale, is provided for, emphasizes the distinction which I think exists. To me it seems clear that this clause, taken alone, does not authorize a sale before default in payment, and that such a right should not be inferred from the power to sell sufficient to pay the amount due or to become due. There were four notes falling due at different times, a failure to pay any of which at maturity would be a breach of the condition, and in that case the holder of the mortgage had the right to sell sufficient to pay that which was to become due, as well as that which was already due, because of the breach.

If it may be said that, taken alone, this clause does authorize a sale before condition broken, still it seems to me that, when considered in connection with the other provisions of the mortgage, it should not be so construed. We may not ignore any part of the instrument in giving a construction to it, but, taking the whole together, arrive at the intention of the parties. Construing the language conferring power to sell in connection with the time given to the appellee in which to pay the debt, and the right to redeem his property

by payment at maturity, I am convinced that it was not mutually understood or intended that the appellant might, at his own option, and without cause, sell the property before default in payment, and thereby deprive appellee of the time allowed in the contract for payment and redemption. It may be that, had the appellee attempted to dispose of or remove the property from the county, appellant, having seized it, might sell it before the debt was due. But no such cause for the sale is alleged or proven; hence that question is not in the case. If causes arose requiring a sale of the property before default in payment, whether or not such causes were named in the mortgage, a court of equity would authorize a sale. If, by reason of the perishable nature of the property, or other cause, the security would be impaired by delaying a sale thereof until the maturity of the debt, the appellant's remedy was ample in a court of equity. It may be said that it is a hardship to hold him to that remedy; but surely not so great a hardship as to deny to the appellee, without cause, the time accorded him by the contract in which to pay his debt and redeem his property. The appellant could not sue upon these notes before maturity without other cause than his arbitrary will, nor could he have a decree foreclosing this mortgage; yet it is held that he may, at his own option, do for himself what the courts would not do for him, that he may not only compel payment of the notes before any of them are due, but may forever put it beyond the power of the appellee to redeem his property according to the contract. I see no distinction in principle between this case and *Bank of Carroll v. Taylor*, 67 Iowa, 572. A like discretion is given to the mortgagee in both cases, and the law announced in that case is supported by reason and the current of authorities. Cases will be found, from states not having a statute like our section 1927, wherein the right to take possession before default

is considered, and, in connection therewith, the right to sell; but in none of them, so far as I have been able to discover, is it held that a mortgagee may sell the property without cause, at his own option, before condition broken. *Wells v. Chapman* does not seem to me to be in conflict with *Bank v. Taylor*. The question certified was whether the mortgagor, he being in possession, had any interest in the mortgaged property subject to execution. This court held that, as the mortgagee had the right to take possession whenever he chose, "and foreclose the mortgage, whether the debt was due or not," there was no interest left in the mortgagor subject to execution. This decision is grounded on the right of the mortgagee to take possession and sell, but not upon the right to sell before default. The right to sell after default extinguished all interest in the mortgagor, subject to execution, as effectively as would the right to sell before. *Richardson v. Coffman*, 87 Iowa, 121, follows *Bank of Carroll v. Taylor*, but does not, as I view it, decide the question under consideration. After remarking upon the disagreement in the adjudicated cases as to the right to take possession, *Wells v. Chapman* is referred to as "the only case we have been able to find where the provision in the mortgage for taking possession is like that in the case at bar. It was held that the mortgagee might seize the property whenever he elected so to do, whether the debt was due or not. That case is decisive of this question." An examination of the further statements in the opinion will show that the right to take possession and to sell for good cause was the subject under consideration, rather than the right to sell without cause, at the option of the mortgagee. To me, this case furnishes an apt illustration of what I believe to be the error in the conclusion of the majority. By that conclusion the mortgagee is sustained in seizing the mortgaged property on the second day after the mort-

gage was given, and proceeding at once to sell the same, without cause or excuse, in payment of a debt for which he had extended credit running over several months. I can not think that the sanction of the law should be given to such arbitrary and unconscionable acts.

C. M. LIMBURG, Appellee, v. GERMAN FIRE INSURANCE COMPANY, Appellant.

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Fire Insurance: OCCUPANCY OF PREMISES: EVIDENCE. Where a two story building, used for mercantile purposes, was vacated by the tenant occupying it, who retained one key for the purpose of showing intending purchasers a counter he had left there, but a saloon keeper, who had formerly been permitted by the tenant to use an upper room of the building to store liquors in, had in such room, within ten days preceding the destruction of the premises by fire, one or two bottles of brandy, a quantity of whiskey, a couple of boxes of wine, and some bottles, *held*, that the building was unoccupied within the meaning of the terms of an insurance policy providing that if the insured premises remained vacant or unoccupied for ten days it should avoid the policy. (1)

90	709
139	210

SAME. Permission in a policy that mechanics may be employed in a building for the purpose of making alterations or repairs for not more than fifteen days, will be construed as constituting such use of the premises an occupancy within the meaning of the above provision.

Appeal from Keokuk Superior Court.—HON. H. BANK, JR., Judge.

FRIDAY, JANUARY 26, 1894.

ACTION on a policy of insurance. Jury trial; verdict and judgment for the plaintiff. The defendant appeals.—*Reversed*.

James C. Davis for appellant.

J. F. Smith for appellee.

KINNE, J.—The defendant company issued to the plaintiff its policy of insurance for the sum of five

hundred dollars on a frame store building in the city of Keokuk, Iowa. The policy insured the property against loss by fire from September 4, 1890, to the fourth day of September, 1891. On March 29, 1891, the property was partially destroyed by fire. The plaintiff brings this action to recover, claiming that the loss is total. The defendant pleads a provision in the policy that if the premises "be or become vacant or unoccupied, and remain so for ten days," the policy shall be void. It alleges that, for more than ten days immediately prior to the fire, said premises had become and remained vacant and unoccupied. It also claims that the insured property was only damaged to the amount of two hundred dollars. Other issues were presented, as to which no question is now made, and they need not be stated.

I. The provision of the policy on which the defense is chiefly based is: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and remain so for ten days." It becomes necessary, therefore, to determine when, in legal contemplation, a building may be said to be "vacant or unoccupied," within the meaning of these words as used in the policy. At the outset it will be well to bear in mind that, in order to avoid liability under this clause of the policy, it is not incumbent on the defendant to show that both conditions existed for the ten days immediately preceding the fire. It is sufficient, under this provision of the policy, to defeat liability, if the building was either vacant or unoccupied for the required time, in the absence of other provisions indorsed upon or added to the policy.

A learned writer has said that the words "vacant and unoccupied" are not synonymous; that "vacant" means empty of everything but air, and that "unoccu-

pied" means that no one has the actual use or possession of the premises; and it is further said that the words must be construed with reference to the kind of structure or building insured. 1 May on Insurance, section 249a. It occurs to us that these words must also be construed in view of the uses and purposes for which the building is adapted; that is, as to whether it is so built and arranged as to be used as a dwelling house, or a store building, or a schoolhouse, or a structure fitted and adapted for use for some other purpose. Webster defines "vacant" as being "deprived of its contents; not filled; empty." The same authority defines "occupy" thus: "To take or hold possession of; or hold or keep for use; to possess." Another definition is: "To hold possession; to be an occupant." It is said that occupancy implies an actual use of a dwelling house as a dwelling place; that the insurer has a right, by the terms of such a policy, to the care and supervision which would be involved in such an occupancy. *Bonenfant v. Insurance Co.*, 43 N. W. Rep. (Mich.) 683; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. Rep. 343; *Ashworth v. Insurance Co.*, 112 Mass. 422; *Weidert v. Insurance Co.*, 24 Pac. Rep. (Ore.) 249, was a case of insurance of a dwelling house, where the policy contained a "vacant" or "unoccupied" clause. It appeared that the plaintiff moved out of the house about March 20; that, on the next day, one McNett moved in, and remained until the twentieth day of June; and, after that time, and up to the time of the fire, the plaintiff or his hired man visited the house daily, and that some of the members of his family were at the house every day. It was held that the house was vacant and unoccupied. In *Keith v. Insurance Co.*, 10 Allen, 228, the court held that the fact that tools remained in a shop, and that it was visited daily by the son of the insured, did not constitute occupancy; that the policy contemplated

some practical use of the building. In *Corrigan v. Insurance Co.*, 122 Mass. 298, the occupant of the house had moved out, leaving in it some of his furniture, and retaining the key; and the premises were held to be unoccupied. In *Herrman v. Insurance Co.*, 81 N. Y. 184, it was held that a dwelling house was unoccupied when no one lived in it; and in *Herrman v. Insurance Co.*, 85 N. Y. 163, the holding was that occupancy contemplated the use of a house by human beings as their customary place of abode. In *Cook v. Insurance Co.*, 70 Mo. 610, the insured had moved out of the house, leaving some furniture, and leaving a man in possession of the house, and to sleep therein. He abandoned it, and afterward the house was burned, no one being then there. It was held that it was unoccupied. In *Insurance Co. v. Cherry*, 84 Va. 72, 3 S. E. Rep. 876, the premises insured consisted, in part, of a dwelling house. The evidence showed that the insured had moved out of the house; that it was not in use, except that a party had put some fodder in the outbuildings; and the buildings were occasionally visited by a resident of the neighborhood, who had the key. The building was held to be vacant and unoccupied.

In *Halpin v. Insurance Co.* (N. Y. App.) 23 N. E. Rep. 482, it was held that a building used as a morocco factory, and which was unused for about six months prior to the fire, was unoccupied within the meaning and contemplation of the parties, even though all the machinery remained in the building, and it was closed and locked, and in the hands of the plaintiff's agent for rent, and he visited it frequently. The court said "that to constitute occupancy of a building used for manufacturing purposes there must be some use or employment of the property. Its use as a place of storage merely is not sufficient. * * * The insurer has a right, by the terms of the policy, to the care and supervision

which is involved in the use of the property contemplated by the parties at the time of entering into the contract." In *Continental Insurance Co. v. Kyle*, 24 N. E. Rep. (Ind. Sup.) 727, a tenant moved out of an insured dwelling house March 26, after which one who had previously engaged the house made some repairs thereon, and kept in the house some planes, and on March 30 put some hay in the stable, and buried some potatoes on the premises, intending to move in on April 1. March 31 the house was destroyed by fire, and it was held that a policy conditioned against the premises becoming "vacant or unoccupied" was avoided. In *Insurance Co. v. Padfield*, 78 Ill. 169, it is said: "A fair construction of the language 'vacant and unoccupied' is that it should be without an occupant, without any person living in it." In *Ashworth v. Insurance Co.*, 112 Mass. 422, it is said: "Occupancy, as applied to such buildings [dwelling house and barn], implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn, belonging to an occupied house, or at least something more than a use of it for storage." In *Insurance Co. v. Wells*, 42 Ohio St. 519, the tenant moved out with no intention of returning, leaving in the premises a barrel of corn and a coal oil can. On the following night the building burned. It was held that it was vacant or unoccupied. In *Sleeper v. Insurance Co.*, 56 N. H. 401, the occupant of the house removed to another town, taking his family, their wearing apparel, and part of their furniture. It was held that the building was vacant and unoccupied, even though he may have intended to return in eight or ten months, and left in the house a few articles not necessary for his present use. In *Moore v. Insurance Co.*, 64 N. H. 140, 6 Atl. Rep. 27, it is held that the premises were vacant and unoccupied where the occupant had removed therefrom, though a little furniture was left in the house; and it

is also held that the terms "vacancy" and "nonoccupancy" are used interchangeably, and as equivalent in meaning. In *Dennison v. Insurance Co.*, 52 Iowa, 457, a building used as a boarding house and hotel, which had been vacated by a tenant, and stood awaiting another occupant, was held vacant and unoccupied. In *Feshe v. Insurance Co.*, 74 Iowa, 676, the tenant moved out of a dwelling house on September 26, and it was burned October 1 following. The owner lived a mile and a half away, and spent a part of each intervening day in examining and cleaning the house, but did not sleep there nights. Her father, who lived near the insured premises, left an axe and grub hoe in the house at night; otherwise it was not occupied. It was held that to all intents and purposes the house was vacant and unoccupied. It was said: "There was nothing left or placed in the house which indicated an intent to occupy it as a dwelling at any time. It is true it had been rented, and a tenant expected to take possession in about two weeks subsequent to the fire; but this is immaterial." In *Snyder v. Insurance Co.*, 78 Iowa, 146, the tenant had moved everything out of the insured dwelling house except some trumpery, a box or barrel, a cross-cut saw, a pair of skates, and did not expect to return, and there was no evidence touching its future occupancy. The house was destroyed by fire the next morning. Carpenters had been at work repairing it. It was held vacant or unoccupied. In *Sexton v. Insurance Co.*, 69 Iowa, 99, the dwelling house had been vacated by the tenant about three months prior to the fire. He had left therein two or three jars, and two large four or five gallon jars, and a molasses keg, and a table. It appears also that plaintiff had in the house some tools and other things. It was held that the articles in the house did not constitute an occupancy, and that a verdict was properly directed for defendant.

Appellee relies upon and cites many cases, among

which we specially refer to the following: *McMurray v. Capital Insurance Co.*, 87 Iowa, 453, was a case where a dwelling house was insured and it was claimed that the premises had become vacant and unoccupied. The facts were that the insured had been away for several months, working at his trade. His wife and children were away temporarily on a visit to her parents. The house remained the home. None of the furniture had been removed. There was no intention to abandon it as a place of residence. The absence was for a temporary purpose only. In *Eddy v. Insurance Co.*, 70 Iowa, 472, the tenant had removed from the house on Tuesday. The fire occurred the following Friday. The plaintiff was residing in another house on another part of the farm; and on the morning after the tenant moved out, the plaintiff took possession of the house, cleaned it, and prepared to move in. Before the fire the plaintiff had in part moved in, had placed therein carpets, bedding and bedsteads, cans of fruit, chairs, pictures, mirrors, stoves, clothing, dishes, and a table, and expected to be there to remain on Saturday; and it was held that the house was not vacant or unoccupied. In *Doud v. Insurance Co.*, 21 Atl. Rep. (Pa. St.) 505, the provision in the policy was, "if the premises insured be vacated." The tenant moved out, and on the following day the owner was at the house all day, and then left, and began packing up preparatory to moving into the house herself, and in fact had placed some things in the house. She was held to be in possession, and that the house had not been vacated. *Roe v. Insurance Co.*, 23 Atl. Rep. (Pa. St.) 718, was like the *Doud* case in its facts. In *Insurance Co. v. Wood* 28 Pac. Rep. (Kan.) 167, it was claimed that the house was unoccupied within the meaning of the policy. The jury found that the plaintiff's family was residing in the house at the time it was burned, but were temporarily absent. The evidence showed that the household goods were all in the

house; that some of them had been packed; that the plaintiff stayed in the house every night until five days before the fire, and thereafter slept at another place, because he was ill; that he was at the house every day up to the day of the fire. The court, while expressing doubts as to whether the building was occupied, held that, as the jury had so found, and there was evidence to sustain their finding, it would not disturb the verdict. In *Ins. Co. v. Brockway*, 28 N. E. Rep. (Ill.) 799, the property was a building occupied by the assured as a dwelling and storeroom. The policy contained a provision like that in the case at bar. The insured ceased to occupy the dwelling part of the building, but did occupy the store up to the time of the fire. The company contended that a failure to occupy the whole building avoided the policy. The court held that the occupancy of the store portion of the building was an occupancy under the terms of the policy. In *Ins. Co. v. Race*, 31 N. E. (Ill.) Rep. 392, the court held that by reason of special provisions in the policy the trustee therein mentioned, or the mortgagee, was not affected by a violation of the conditions of the policy by the assured as to nonoccupancy; and, further, as the proceeding was in equity, which will not enforce a penalty or forfeiture, that the company must show that the vacancy or nonoccupancy in some degree contributed towards causing the fire. In *Insurance Co. v. Race*, 29 N. E. Rep. (Ill.) 846, the insured had moved furniture in the house, and from that and other circumstances the court held it was not vacant and unoccupied.

It will be observed that few if any of the cases relied upon by the appellee sustain his contention that the premises in controversy were occupied within the meaning of that word as used in policies of insurance. Facts touching vacancy or occupancy differ in each case presented; hence each case must be determined upon its own peculiar facts. It must be conceded, also, that

the decisions of courts are not always in harmony where the facts are substantially the same. It will serve no useful purpose to further review the authorities. From them may be deduced certain rules or principles applicable to cases like that at bar. We must, in construing the meaning of the words, "be or become vacant or unoccupied," have in view not only the technical meaning of the words, but the uses for which the property is adapted, which must have been in contemplation of the parties when they entered into the contract. Again, mere use of a store building as a place in which a few articles may be left, no business being carried on therein, and the premises not being so used as to in any wise insure for them the care, watchfulness, and protection from danger to exposure to fire which must have been in contemplation of the parties to the contract, in view of the adaptability of the building for certain uses only, can not be deemed an occupancy. To prevent a policy from being avoided for vacancy or unoccupancy in such a case, the use and occupancy must be of such a character as ordinarily pertains to a building adapted for such purposes. A mere storage of property therein, which does not involve the care and watchfulness which the policy holder owes to the insurer, will not suffice to constitute occupancy.

The undisputed facts in the case at bar are that the insured property was a two story building, the lower story being adapted and used for a storeroom, with access therefrom to the story above. There was no means of access to the upper story, except by going through the storeroom. When the policy issued, the building was occupied by one Reimbold as a tenant of the plaintiff. He had a cigar store in the front part of the building downstairs, and a cigar manufactory in the rear part. There were two rooms upstairs which seem to have been but little used by the tenant. His lease expired on March 11, 1891. He moved his stock out

of the building on March 7, and on the same day he had his government license transferred to permit his carrying on business in the building to which he had moved. He had a policy of insurance upon his stock and tools used in his business. This he had properly transferred on March 6. When he moved out on March 7, he left in the building one counter, which he did not intend to move, but wanted to sell, some shelving, and some leaf tobacco in an upper room. All these articles he had taken from the building prior to March 20, except the counter, and he thinks he had them all out, except the counter, before the eighteenth of March. The counter remained in the building and was burned. The fire occurred on March 29. The tenant, when he went out, or at least by March 11, gave one key to the building to the agent of the insured, and retained the other. He retained the key so that he might show intending purchasers the counter which he had left there. He exercised no control over the property after his lease expired. During the continuance of his tenancy he had given one Masterson, a saloon keeper, the right to store some liquors in one of the upper rooms, for which Masterson was to pay him two dollars per month. He had given Masterson no authority to thus use the upper room after his own lease expired. Masterson's place of business was two or three doors from this building. He never used any part of this building as a storeroom to do business in. He simply kept a few bottles of liquor upstairs there, and, as he needed a fresh supply in his saloon, he would come there and get it. He did not come there frequently, only occasionally. He had in the building, within ten days before the fire, one or two bottles of brandy, one or two jugs of whisky, some bottles of whisky, and a couple of boxes of wine, and some bottles. It does not appear that Masterson had any key to the building after March 11, or that he was allowed any means of access to his

goods. He had no lease from the plaintiff. He was not thus occupying or using this upper room, after the tenant moved out, by reason of any arrangement with plaintiff, so far as the record shows. Nor does it appear that his use of this room was known to the plaintiff. The plaintiff's agent had rented the building to a new tenant, who was to move in on March 18, but failed to do so. At the time of the fire there was no certainty as to when, if at all, the building would be occupied. Certain repairs had been made in anticipation of the occupancy of the tenant who was to move in, and failed to do so. The plaintiff's agent testified that at the time of the fire the plaintiff was not in any way occupying the building, and had no tenant in there. The plaintiff's agent was frequently in the storeroom, painting and papering and scrubbing it out, prior to the fire. Do these facts show occupancy? We think not. The tenant who was to occupy more than ten days prior to the fire had failed to come. No other tenant had been found. The premises were not used for the purpose of carrying on business therein for more than fifteen days preceding the fire. They stood awaiting a tenant. There is nothing to show that the plaintiff would ever be able to rent the premises. There was absolutely no use made of the building whatever for the ten days preceding the fire, except that the counter of the late tenant was in there, and the Masterson liquors, before mentioned. The parties, when they entered into the contract of insurance, did not contemplate that the property would be treated as occupied if an outgoing tenant left an old counter in the building, nor if some one unknown to the plaintiff stored a few bottles of liquor there. Such use, if it can be dignified into a use, of the building, insured to it practically no care and protection whatever. Such a use, to our minds, falls far short of a compliance with the terms of the contract. That contemplated the use incident to a store,

and such a use would carry with it a large degree of protection to the property, which was not essential or possible under the facts as they appear here. The building was vacant or unoccupied for more than ten days prior to the fire. Counsel for the appellee seem to think that to hold the parties to the contract which they have voluntarily entered into, and in the absence of fraud, is technical. We can not change or ignore the agreement of the parties. We can not make a new one for them, but we must construe their agreement as we find it.

II. The appellee contends that, as the policy provides that mechanics may be employed in the building, altering or repairing it, for not more than fifteen days at any one time, and it was being repaired, that should be considered as an occupancy within the terms of the policy. We do not think so. The repairs might be made while the building was occupied. Again, it is not shown that these repairs continued up to within ten days before the fire. The provision of the policy does not indicate that it was in the contemplation of the parties that there should be no occupancy of the premises while repairs were being made. As the point is not pressed with any apparent confidence, we need give it no further consideration.

III. Under the instructions of the court the jury should have found for the defendant. Indeed, under the undisputed facts, there was no such occupancy as the policy contemplated, and hence the court would have been justified in directing a verdict for the defendant.

IV. The jury were told by the court in an instruction that, if they found that the building was not totally destroyed, and it could be repaired at an expense of two hundred to two hundred and fifty dollars, then the plaintiff's damages would be limited to the amount it would have cost to repair said building, and put the same

in as good condition as before the fire occurred, with six per cent. interest per annum thereon. Under the provisions of the policy this instruction was proper, and, whether it was so or not, the jury were bound to follow it. The undisputed evidence was that for two hundred and fifty dollars the building could have been made as good as it was before the fire. The jury disregarded the court's instruction and found for the plaintiff for the full amount of the policy, with interest. The court should have set the verdict aside for the reasons given. REVERSED.

DEBORA K. MOORE, Appellee, v. ORDER OF RAILWAY
CONDUCTORS OF AMERICA, Appellant.

Mutual Insurance: PAYMENT OF ASSESSMENTS: DEFAULT: WAIVER.

Where, notwithstanding a by-law of a mutual life insurance company, that the failure to pay any assessment within sixty days from the date of notice, should work a forfeiture of membership in the association, payment of assessments were received from a member at different times after the expiration of sixty days, and a circular was sent to such member to the effect that remittances upon assessments would be received after the expiration of sixty days upon condition that the member was in good health and free from injury, held, that the right of the association to claim a forfeiture of such member's certificate because certain assessments had remained unpaid for more than sixty days at the time of his death was waived. (1)

SAME: POWERS OF OFFICERS. An officer of a mutual benefit association who is its executive head, keeps its records, holds its funds in trust, and pays out the same on approval, has power to bind the association by waiving a forfeiture provided for in its by-laws. (2)

Appeal from Linn District Court.—HON. JAMES D.
GIFFEN, Judge.

FRIDAY, JANUARY 26, 1894.

THE plaintiff brings this action in equity upon a certificate of life insurance issued by the defendant, a mutual life insurance company upon the assessment

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122	265
90	721
132	529
90	721
140	46

plan, to the deceased husband of the plaintiff, in which certificate the plaintiff is named as the beneficiary. The plaintiff alleges the death of her husband, that proofs of death were made, that the defendant refuses to pay the amount due to her upon said certificate or to make an assessment therefor, and prays that the defendant may be compelled to make an assessment for the payment of the amount due under said certificate. The defendant answered, alleging a forfeiture of said certificate by failure to pay assessments 74 to 82 inclusive, for one dollar each, made during the lifetime of the insured, and of which due notice was given. The plaintiff filed a reply in five separate paragraphs. The first denies the allegation of forfeiture, and admits certain other allegations that are not questioned, and not necessary to be stated. The second alleges a waiver of the right to forfeiture for nonpayment of assessments 74, 75, and 76 by an extension of time for payment, and tenders "nine dollars, together with the interest thereon from the dates the same were due for the said assessments 74 to 82, inclusive." The third alleges that on March 3, 1887, S. C. Moore sent three dollars to the defendant, with direction to apply the same in payment of assessments 77, 78, and 79; that the defendant, ignoring said direction, without authority applied the same to assessments 71, 72, and 73, and sent no statement showing upon what previous assessments said payment had been applied; that S. C. Moore did not authorize or approve of said application, and that defendant retains said three dollars. The fourth division alleges that the sixty days allowed for the payment of assessments 77 to 82, inclusive, had not expired at the time of the death of Mr. Moore. The fifth alleges a further waiver as to assessments 74, 75, and 76, in that, after the expiration of sixty days, the defendant continued to consider and treat Mr. Moore as a member by making assessments against him, and

giving notice thereof. The defendant filed an admission of certain allegations in the reply, and a denial that it did not have authority to apply said payment of March 3, 1887, to assessments 71, 72, and 73. Also denying that it did not send a statement to Mr. Moore, showing upon what previous assessments said three dollars had been applied. The decree was entered requiring defendant to make an assessment, and out of the proceeds to pay to the plaintiff two thousand, five hundred dollars, "less the sum of six dollars due the defendant on assessments numbered 77, 78, 79, 80, 81, and 82, together with interest." The defendant appeals.—*Affirmed*.

Charles A. Clark for appellant.

E. C. Herrick for appellee.

GIVEN, J.—Among numerous facts admitted in the pleadings and in an agreed statement of facts are the following: The certificate sued upon makes the application upon which it was issued a part of the contract. In the application the assured agreed "to make punctual payment of all dues and assessments, and to conform in every respect to the by-laws and rules and regulations now in force, or which may be lawfully adopted hereafter." The by-laws provide as follows: "Any member who fails to pay any assessment within sixty days from the date of the notice thereof shall forfeit his membership in the association, and all right to any benefit therein." Assessments were duly made, and notices thereof given to the deceased, as follows: Assessments 65, 66, and 67, October 1, 1886; assessments 68, 69, and 70, November 1, 1886; assessments 71, 72, and 73, December 1, 1886; assessments 74, 75, 76, January 20, 1887; assessments 77, 78, and 79, March 1, 1887; assessments 80, 81, and 82, April 1, 1887. November 22, 1886, deceased remitted three dollars "for assessments num-

bered 68, 69, and 70," but which defendant applied to the payment of the previously unpaid assessments 65, 66, and 67. On December 23, 1886, deceased remitted three dollars "for assessments numbered 71, 72, and 73," which the defendant applied to the payment of 68, 69, and 70. On March 3, 1887, the deceased remitted three dollars in payment of 77, 78, and 79. The defendant stamped the exhibit accompanying the remittance, "Applied for previously unpaid assessments, \$3.00 due," and sent the same to the deceased with second notices of assessments 71, 72, 73, 74, 75, and 76. The money thus paid was retained by the defendant, and never returned. All the assessments mentioned were duly and regularly made. The assured, while in good health, and free from injury, was run over by an engine April 20, 1887, which caused his instant death. The number of members in good standing was largely more than sufficient to yield a sum in excess of the limit of the certificate, namely, two thousand, five hundred dollars.

I. The first contention is whether the burden of proving nonpayment of assessments is upon the appellant, or upon the appellee to prove payment. In the view we take of the case as shown in the pleadings, the question of payment or nonpayment of assessments is not involved. The appellant alleges nonpayment of assessments 74 to 82, inclusive. The agreed statement of facts shows that the sixty days allowed for payment had not expired as to assessments 77 to 82 at the time of the death of Mr. Moore. The agreement to pay assessments was by the assured alone, "I agree to make punctual payments," etc. "Any member who fails to pay any assessments within sixty days from the date of the first notices shall forfeit his membership in the association, and all right to any benefit therein." We think that a forfeiture can not be based upon a failure to pay existing assessments not due at the time of the

death of the assured. That such assessments may be a valid claim against the estate of the deceased, and may be deducted from the amount due on the certificate, is not questioned in this case. We are of the opinion that the failure to pay assessments 77 to 82 was not, under the facts, ground for forfeiting the certificate.

It follows that the only assessments remaining to be considered are 74, 75 and 76. Referring to the reply, we see that in the second division the appellee alleges a waiver as to these assessments, and in the third division a payment of 77, 78, and 79. Said third division is somewhat complicated. It commences by saying, "and for a further defense to said alleged forfeiture for nonpayment of said assessments numbers 74, 75, and 76," and then states the dates of the notices of 71 to 79, inclusive, and alleges that on March 3, 1887, Mr. Moore sent three dollars, with written direction to apply it on 77, 78, and 79; that the defendant wrongfully applied it on 71, 72, and 73; and then says: "And the plaintiff alleges that the defendant had no right or authority to apply said money upon said assessments 71, 72, and 73; that the acceptance and retention of said money under the said written directions of said S. C. Moore to apply the same on said assessments 77, 78, and 79 constituted a payment of said assessments, and a waiver on the part of the defendant of the failure, if there were, to pay said assessments 71 to 76, inclusive; and the defendant is now barred and estopped by the said facts from claiming any forfeiture for the nonpayment of assessments 71 to 76, inclusive, or either of them." Clearly this is not an allegation of payment of assessments 74, 75, 76, but of 77, 78, and 79. It is only a further plea of waiver as to 74, 75, and 76. It is not alleged nor is there any evidence to show, that said remittance of March 3 was applied or directed to be applied to assessments 74, 75, and 76. The allegation is, and the evidence tends to show, that it was directed

to be applied to 77, 78, and 79, and that it was applied to 71, 72, and 73. Evidence was introduced tending to show that after assessments 56, 57, and 58 a change was made by the appellant in the manner of keeping accounts, and that said assessments 56, 57, and 58 were omitted, to be carried forward against assured. That Mr. Daniels, secretary of the appellant company, paid said assessments on his own motion, rather than to explain the omission; and afterwards reimbursed himself from a remittance made to pay a subsequent assessment, without informing the assured. It is claimed that this payment was a satisfaction of 56, 57, and 58, and that, applying the subsequent remittances, they were sufficient to cover all subsequent assessments, including 74, 75, and 76. It is sufficient to say that no such claim is made in the reply, and, if it had been, we are inclined to think that, as Mr. Daniels made the payment of 56, 57, and 58 without the request or knowledge of the assured, and to prevent a forfeiture of the certificate, he might properly reimburse himself from the next remittance; but as to this we express no opinion, as, under the pleadings, the question is not involved in the case. In view of the arguments, we have examined the pleadings with care as to this question of payment, and reach the conclusion that payment is not claimed as to any of the assessments in question; that no claim of payment is made as to 74, 75, and 76; and that the failure to pay 77 to 82, inclusive, would not be ground for forfeiture. Therefore the question of payment, or of the burden of proof as to payment or nonpayment, is not involved in this case. The case, as presented in the pleadings, stands upon the question whether there was a waiver of payment as to assessments 74, 75, and 76.

II. We have seen that notices of assessments 74, 75, and 76 were dated January 20, 1887, and were not paid within the sixty days allowed, nor since, except by

the tender made by the plaintiff. The appellant had unquestioned right at and after the expiration of said sixty days to treat Mr. Moore's membership as forfeited, unless it had waived that right. If it did waive that right, it is now estopped from asserting it. "Waiver is a voluntary relinquishment of some right which, but for such relinquishment, a party would have continued to enjoy. Voluntary choice, and not mere negligence, is the essence, though from negligence unexplained such election may be inferred. Waiver is a question of fact to be determined from declarations and acts or from forbearance to act." Anderson's Law Dict., "Waiver." A waiver may exist regardless of the intention of the insurer, as when its acts and declarations or forbearance to act gives the insured reason to believe that the right to a forfeiture has been waived. In the case of *Tobin v. Aid Society*, 72 Iowa, 261, it is said, quoting from May on Insurance: "It is not the intention of the insurer, but the effect upon the insured, which gives vitality to the estoppel." In *Bailey v. Mutual Benefit Association*, 71 Iowa, 689, it is said: "The defendant received and held the money until after the death of the deceased, and he had a right to regard the contract as in force, regardless of any intention of the defendant to the contrary."

We are to inquire, therefore, whether, from the declarations and acts or forbearance to act of the defendant, Mr. Moore had a right to regard his contract of insurance as in full force up to the time of his death. The facts mainly relied upon as showing not only an intention on the part of the appellant to continue the contract, but that warranted the assured in believing that the contract was continued in full force, are briefly these: Mr. Moore became a member August 23, 1885, and, as we have seen, eighty-two assessments were made against him. As to seventy-six of these, the sixty days for payment had expired before his death.

Assessments 56, 57, and 58 were never paid, except by Mr. Daniels, as heretofore stated. Fifty-nine, 60 and 61 were not paid until one day after the expiration of the sixty days, and 71, 72, and 73, if at all, not until about thirty days after. Notwithstanding these failures to pay within the sixty days, the appellant continued to make assessments against Mr. Moore, to send him notices thereof, to receive payment thereon, both before and after sixty days, and in every respect to treat him as a member of the association. With the notices of assessments 77, 78, and 79, dated March 1, 1887, the appellant's secretary inclosed to Mr. Moore the following: "This explains how you can be reinstated after forfeiting your membership: As members occasionally forfeit their membership unintentionally, and remit soon after the time has expired, the insurance committee has instructed me to accept remittances received after the expiration of the sixty-days limit if received before the certificate number has been filled, but that in each case it must be only on condition that the member is in good health, and free from injury. Thus any who are late, and have forfeited their membership, may be reinstated by remitting within a reasonable time, if they are in good health, and free from injury, in accordance with the conditions above." It is true the sixty days for payment of assessments 74, 75, and 76 had not expired when notices of 77, 78, and 79 were sent, and that the sending of these notices does not indicate a waiver as to 74, 75, and 76. It is equally true that this circular was intended to apply to 74, 75, and 76. Surely the assured might understand therefrom that, instead of being required to pay assessments 74, 75, and 76 within the sixty days, he might pay them upon the terms stated in this circular. While we might hesitate to find that the general course of business between the appellant and deceased was such as to establish the waiver alleged, we are, with this circular

before us, without doubt upon that question. The information contained therein was transmitted to the assured before the expiration of the time for paying assessments 74, 75, and 76. It clearly indicates an intention upon the part of the appellant not to forfeit for failure to pay at the expiration of the sixty days, and gave to the assured the right to believe that the contract would be continued in force for a reasonable time, even though he did not pay within the sixty days, if he was in good health, and free from injury, at the time of payment. Upon this subject see *Loughridge v. Iowa Life and Endowment Association*, 84 Iowa, 141.

It will be noticed that the acts relied upon as showing a waiver are those of the insurance company as indicated in said circular and of the secretary of the appellant company. The appellant contends that neither of these had authority to alter or change the by-laws; that under the by-laws a forfeiture followed from a failure to pay, and that there was no authority in the committee or secretary to reinstate upon any terms. A large number of authorities are cited that go far to sustain this claim, but we think that the contention is fully answered in the case of *Loughridge, supra*. In that case the by-laws authorize the secretary to keep the records, accounts, and seal of the company, conduct the correspondence, collect moneys due, countersign certificates, and to make assessments, records and communications; also, to notify members of assessments, to bank the funds at the close of each day's business, balance his cash account, turn over the balance to the treasurer, "and perform such other duties as the directors deem necessary." The by-laws of the appellant provide that "the insurance committee shall be the executive head of the association," and then follow certain specified powers. They also provide that the grand secretary shall keep a record of the business, the register of members, hold in trust funds of the asso-

ciation for claims approved, pay the same on approval, submit an annual report, exhibit vouchers for expenditures, and that his books shall be subject to inspection by any member of the insurance committee, or any person appointed by them. It will be noticed that as to the question under consideration these by-laws are not materially different. In the case of *Loughridge, supra*, this court said: "It can not be doubted that it was competent for the defendant to waive the forfeiture on account of the nonperformance of the conditions of the policy. Such waiver could have been made by the secretary, as clearly appears by the consideration of the eighteenth section of the by-laws quoted above." Whatever the holding may be elsewhere, the rule in this state is that, if the secretary or other executive officer of an association like this gives the assured reason to believe that the right of forfeiture has been waived, the association is bound by their acts.

Other questions discussed are disposed of in those that we have considered. We are in no doubt but that if Mr. Moore, being in good health, and free from injury, had, immediately previous to his death, offered payment of the assessments unpaid, it would have been received by the defendant without question, and Mr. Moore continued in membership, as had been done in the past, notwithstanding his previous failures. It follows from our conclusions that the decree of the district court must be AFFIRMED.

SUPPLEMENT.

H. DAY, Administrator, Appellee, v. JOHN RAMSDELL
et al., Appellants.

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90 731
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Promissory Note: SIGNATURE: CONSTRUCTION. A promissory note reciting that "we, the Tama Paper Company, promise to pay," etc., but signed merely by two persons describing themselves as president and secretary, respectively, is the individual obligation of the persons thus signing the same.

Appeal from Tama District Court.—HON. J. H. PRESTON, Judge.

THURSDAY, MAY 19, 1892.

ACTION upon a promissory note. There was a demurrer to the petition, which was overruled, and judgment was entered for the plaintiff. The defendants appeal.—*Affirmed.*

Struble & Stiger for appellants.

J. W. Willett and *O. H. Mills* for appellee.

ROTHROCK, J.—The note upon which the action was brought is in these words:

"\$500.

TAMA CITY, April 20, 1885.

"One year after date we, the Tama Paper Company, promise to pay to the order of H. Day, administrator, five hundred dollars, at Tama City, Iowa, value received, with interest at eight per cent.

[Signed.] "JOHN RAMSDELL, Pres.

"H. E. RAMSDELL, Sec."

The demurrer was to the effect that no action could be maintained on said note against the defendants, because it appears from the petition that the

(731)

note sued upon is not the personal obligation of these defendants, but is the personal obligation of the Tama Paper Company, and that it appears from the averments of the petition and the note in suit that it was executed by the defendants for the Tama Paper Company, by them as president and secretary of said company. It does not appear that the Tama Paper Company was a corporation when the note was executed, nor whether it was a partnership or voluntary association of persons. On the face of the instrument, it is the undertaking of the defendants. The promise that "we, the Tama Paper Company," will pay the amount named, has direct reference to the signatures affixed to the note. It designates John Ramsdell and H. E. Ramsdell as the promisors. It has reference to no other person than the persons whose names are signed to the paper. It is true that they are designated as the "Tama Paper Company." It may be that they are the "Tama Paper Company." We know of no reason why two or more persons may not engage in business, and adopt a company name. The fact that the terms "Pres." and "Sec." are added to the names of the defendants does not limit the obligation of the defendants. The language of the body of the instrument can not be controlled by the mere description of the person whose name is signed thereto. *Scraper Co. v. Tuttle*, 61 Iowa, 423; *Heffner v. Brownell*, 70 Iowa, 591. In our opinion, the ruling of the district court in overruling the demurrer is in accord with the line of decisions in this state upon notes similar to the one in suit. See *Wing v. Glick*, 56 Iowa, 473; *American Insurance Co. v. Stratton*, 59 Iowa, 697; *Lewis v. Tilton*, 64 Iowa, 220; and *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 162. The judgment of the district court is AFFIRMED.

KINNE, J., having been of counsel, took no part in the decision of this case.

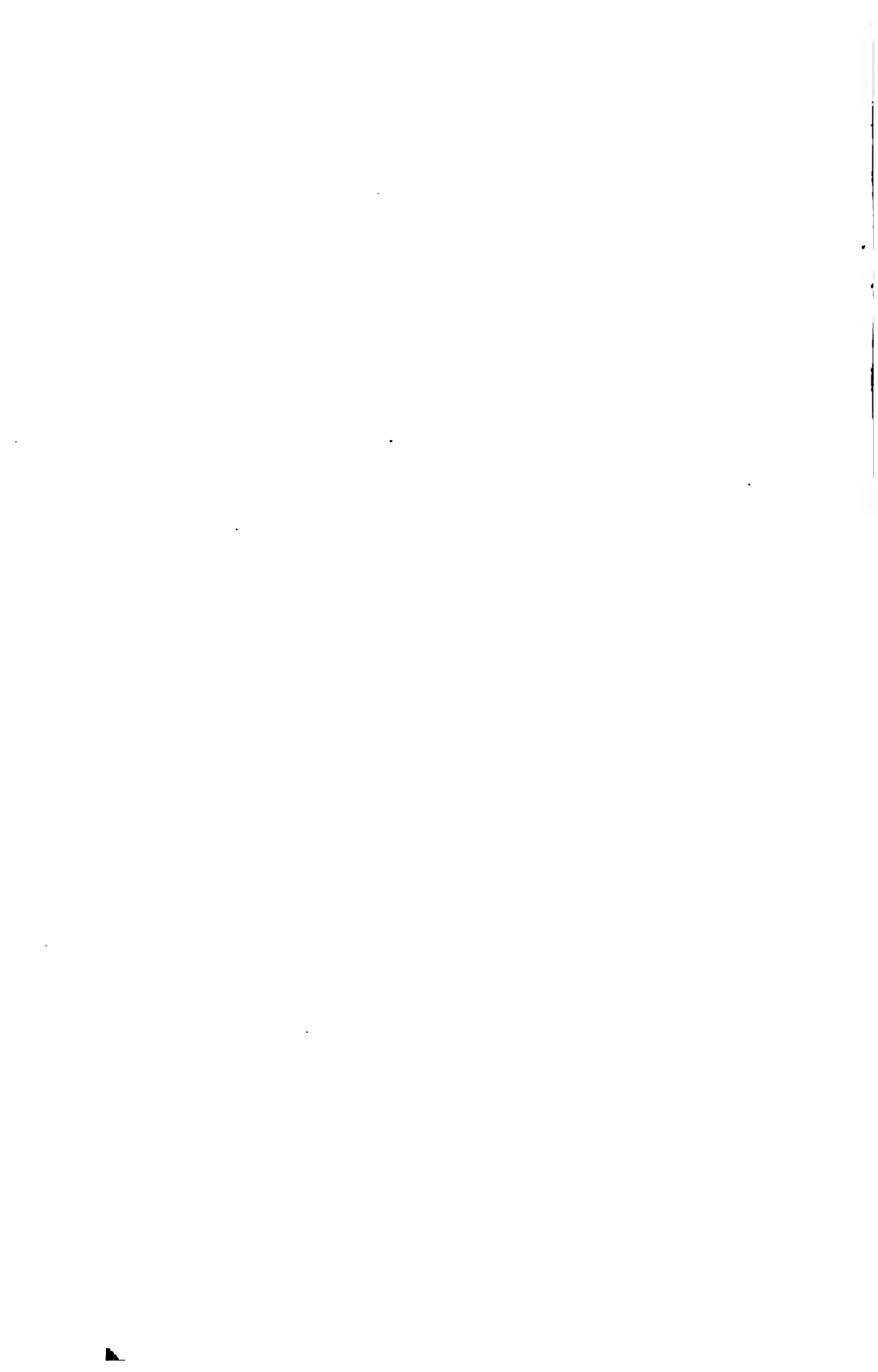
OPINION ON REHEARING.

TUESDAY, JANUARY 23, 1894.

ROBINSON, J.—A rehearing having been ordered in this case after the former opinion was filed, it has been reargued, and is again submitted for our determination. Since the original submission of this cause, we have had occasion to consider the liability of persons who sign obligations similar to that involved in this case, and the relief which they may obtain, in the cases of *Lee v. Percival*, 85 Iowa, 639; and *Matthews v. Dubuque Mattress Co.*, 87 Iowa, 246. Our views on the questions involved have been so fully expressed in the numerous cases that we find it unnecessary to add much to our former opinion in this case. A majority of us are satisfied with the conclusion therein reached, which is, in effect, that the note in suit purports to be the personal obligation of the defendants. It will be noticed that the question decided was raised by demurrer. Whether the words, "We, the Tama Paper Co., promise to pay," in connection with the signatures to the note, create such an ambiguity that with proper pleadings the defendants might have shown that they signed the note in a representative capacity only, is a question not involved in this case. It can not be said that the petition, which alleges that the defendants made and delivered the note in suit, does not state a cause of action against them. Our former conclusion is adhered to, and the judgment of the district court is AFFIRMED.

GRANGER, C. J.—I adhere to the views expressed in the dissenting opinion in *Matthews v. Mattress Co.*

KINNE, J., took no part in the determination of this case.



APPENDIX

NOTES OF CASES NOT OTHERWISE REPORTED

S. H. WOODRUFF, Appellant, v. DES MOINES INSURANCE COMPANY,
Appellee.

90 735
97 12

FIRE INSURANCE: LOSS: PROOF OF LOSS: ACTION PREMATURELY BROUGHT.

Appeal from Tama District Court.—HON. D. R. HINDMAN, Judge.

MONDAY, JANUARY 22, 1894.

ON September 9, 1889, the plaintiff filed his petition to recover upon a policy of insurance against loss by fire, issued to him by the defendant. He alleged a loss April 1, 1889, notice of loss, and that about April 16, 1889, he gave to the defendant's adjuster, S. B. Leech, all the facts concerning the burning, and a full and complete list of every article destroyed, covered by the policy; that the plaintiff and said adjuster agreed upon the amount to be paid for the damage to many of the articles, and differed as to others; that said adjuster promised to refer the difference to the office of defendant for adjustment, "and at no time did defendant intimate that further or other proof of loss would be required." The defendant answered that no proof of loss had ever been made, and alleged that this suit was commenced within the time prohibited by statute. Upon the conclusion of the evidence for the plaintiff, the court, on motion, directed a verdict for the defendant, and entered judgment thereon. The plaintiff appeals.—*Affirmed.*

W. H. Stivers, Dudley & Sammis, and W. B. Louthan for appellant.

Cole, McVey & Cheshire for appellee.

GIVEN, J.—The record shows, without conflict, that the loss occurred April 1, 1889; that there was no proof of loss or waiver of such proof, if at all, prior to the interview of April 16 with S. B. Leech; that on June 20, 1889, the plaintiff, by his attorneys, Dudley & Sammis, placed in the hands of the sheriff of Polk county, for service, an original notice, entitled

as in the case of S. H. Woodruff, plaintiff, against the Des Moines Insurance Company of Des Moines, Iowa, notifying the defendant as follows: That on or before the twentieth of September, 1889, there would be on file in the office of the clerk of the district court of Tama county, Iowa, the petition of S. H. Woodruff, claiming one thousand, nine hundred dollars, with interest, as due "for loss by fire on or about April 1, 1889, under your policy number 23716, issued June 22, 1885." The sheriff's return shows service on the twenty-first day of June, 1889, "on the within named defendant, Des Moines Insurance Company of Des Moines, Iowa."

One ground of the defendant's motion for a verdict was that this action was prematurely begun. The statute, after providing as to notice and proof of loss within sixty days from the time the loss occurred, provides, further, "that no action shall be begun within ninety days after notice of such has been given." The delivery of the original notice to the sheriff of the proper county, with intent that it be served immediately, is a commencement of the action. Code, section 2532. The original notice in this case was delivered to the sheriff of the proper county, and served, within much less than ninety days after the loss occurred. The appellant contends that as the defendant named in that notice, and served, was the Des Moines Insurance Company of Des Moines, Iowa, and not the Des Moines Insurance Company, the delivery of the notice did not constitute a beginning of this action, and that it was not begun until the defendant appeared to the action, which was more than ninety days after the loss. There is not the semblance of a reason to doubt that this original notice was intended and accepted by both parties as the original notice in this case. It is identical with the petition as to the party plaintiff, the court, the cause of action, number of policy, and in every other particular, except that the words "of Des Moines, Iowa," follow the corporate name of the defendant company, words that were evidently inserted by the plaintiff's attorneys, not with a view to an action against a different corporation, but to designate the location of the defendant company. Whatever might be said as to the rights of the defendant under this notice, we are in no doubt, but the delivery of it to the sheriff was a commencement of this action, and, that being within the ninety days, the defendant's motion for a verdict was properly sustained.—AFFIRMED.

KINNE, J., taking no part.

A. W. COFFMAN, Appellant, v. FRANK TRIMBLE, Appellee.

JUSTICES OF THE PEACE: JURISDICTION IN POTTAWATTAMIE COUNTY.

Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

WEDNESDAY, JANUARY 24, 1894.

THE plaintiff commenced this action in the court of a justice of the peace of Avoca, to recover a sum of money. On the application of the defendant, the action was dismissed by the justice. That proceeding was reviewed by the district court, by means of a writ of error and, in effect, affirmed. From the judgment of the district court the plaintiff appeals.—*Reversed.*

Turner, Smith & Cullison for appellant.

No appearance for appellee.

ROBINSON, J.—This cause is submitted in this court on a certificate, which shows the following facts: "The plaintiff, at the time of the commencement of this action, and at the time of the hearing in the district court, resided at Avoca, in Pottawattamie county, east of the west boundary line of range forty. The defendant was at the same time a resident of Council Bluffs, west of that boundary line." The question certified is stated as follows: "Has a justice of the peace of Pottawattamie county, Iowa, east of the west boundary line of range forty, jurisdiction of parties living and residing west of said west line of range forty, in said Pottawattamie county?" "The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand, five hundred and thirteen of this chapter." Code, section 3507. The section 3513 specified relates to written contracts stipulating for payment at a particular place, and does not apply to this case. We infer from the record and argument submitted to us that the judgment of the district court was founded upon the theory that section 3507 is so far modified by chapter 198 of the Acts of the Twentieth General Assembly that the jurisdiction of justices of the peace of Pottawattamie county, excepting in actions founded on written contracts, stipulating for payment at a particular place, does not extend beyond that side of the line on which they reside. That question was considered in *Deere v. City of Council Bluffs*, 86 Iowa, 591, 53 N. W. Rep. 344, where it was held that there was nothing in the chapter specified which restricts the jurisdiction conferred by section 3507; and we are satisfied with that decision. It is proper to say that it was not announced until after the judgment of the district court in this case had been rendered. **REVERSED.**

LIDDLE & CARTER *et al.*, Appellees, v. H. R. ALLEN *et al.*, Appellants.

FRAUDULENT CONVEYANCES: INTENT TO HINDER AND DELAY CREDITORS:
GARNISHMENT: LIABILITY OF GARNISHEE.

WEDNESDAY, JANUARY 24, 1894.

Appeal from Shelby District Court.—HON. N. W. MACY, Judge.

THIS suit is a controversy between the creditors of the defendant H. R. Allen, an insolvent debtor, on the one side, and the defendants Smith & Cullison, who claimed to have purchased the property of said Allen, on the other. It is claimed by Smith & Cullison that they took a bill of sale of the personal property of said Allen, and a deed or conveyance of his real estate, in good faith, and for a valuable consideration. The creditors maintained that the transfer of the property from the insolvent was fraudulent as to his creditors. A decree was entered in the district court in favor of the creditors, and Smith & Cullison appeal.—*Affirmed.*

Smith & Cullison for appellants.

Byers & Lockwood and *Jesse B. Whitney* for appellees.

ROTHROCK, J.—I. It would be an almost endless undertaking to set out this whole controversy as shown by the pleadings. It will be sufficient to state the facts and issues in a general way. For some time prior to April 6, 1889, the defendant Allen was engaged in mercantile business at Irwin, in Shelby county. He was the owner of the lot and building used by him in his business. He owned the stock of goods in the building, and the notes and accounts against customers, and the store furniture and fixtures. He was somewhat in debt, but there were no liens on his property. On said sixth day of April, 1889, he executed a chattel mortgage on his stock of goods and merchandise, furniture and fixtures, and notes and accounts, to one M. Humphrey and to A. C. Allen, the wife of said H. R. Allen. The consideration named in the mortgage was four thousand, eight hundred and eighteen dollars, and on its face it appeared to have been given to secure the payment of six promissory notes. The mortgage was not filed for record until the twenty-fourth day of July, 1889. The filing of this mortgage precipitated a crisis in the business career of Allen. Two days thereafter, some of the wholesale merchants who had claims against him commenced actions, and sued out attachments, and levied the same on his stock of goods. At about the same time, Allen made another chattel mortgage upon his stock of goods, notes, and accounts to his wife, to secure the payment of a note for one thousand, seven hundred and sixty dollars. This mortgage was made subject to the mortgage for four thousand, eight hundred and eighteen dollars previously given to Humphrey and A. C. Allen. He also gave to A. C. Allen a real

estate mortgage on the lot and building, to secure the payment on said sum of one thousand, seven hundred and sixty dollars. On the same day, and after the writs of attachment had been levied on the stock of goods, and while the same was in the possession of the sheriff under said writs, H. R. Allen made and delivered to Smith & Cullison a bill of sale of all of said personal property, notes, and accounts, subject to the mortgages above referred to, for a named consideration of one thousand dollars; and on the same day said Allen and his wife made and delivered to Smith & Cullison a warranty deed for the lot and building, for the same consideration. Within a few days thereafter, other wholesale merchants commenced actions on their claims against Allen, and garnished Smith & Cullison as supposed debtors of Allen. In all these actions judgments were obtained against Allen. Later on, other creditors commenced actions, and recovered judgments against Allen, and issued executions, which were returned unsatisfied, and the judgment creditors filed petitions in equity to subject the said real estate to the payment of their judgments. Issues were made upon all these garnishment cases, and on the petitions in equity, and all of the actions were, by agreement, consolidated and tried as one case, which was by said agreement transferred to the equity side of the court, and tried as in equity; and it is here for trial anew in the same manner.

The ultimate question for determination is whether the bill of sale and the deed to Smith & Cullison were void as to the creditors of H. R. Allen. If it was a good faith transaction, the case demands no further consideration. But it appears without conflict in the evidence that Smith & Cullison knew, when they took the bill of sale and deed, that attachments had been levied on Allen's stock of goods, and that his career as a merchant was practically closed. They also knew that there were other creditors, who had not yet commenced actions against Allen. Smith & Cullison paid no consideration whatever for the transfer of the property to them. It is true that they claim that they performed legal services for Allen for quite a large amount, but all of this claim for legal services, except a mere nominal sum, accrued and was earned in this very litigation with the creditors of Allen. A large part of it was earned in a protracted trial of an action of replevin from the sheriff of part of the goods in which the rights of Mrs. Allen as a mortgagee was the question at issue, and in which she was defeated. This action in replevin was a direct contest between Mrs. Allen and the creditors, and Smith & Cullison were attorneys against the creditors. We need not set out the evidence in detail. The district court was unquestionably right in finding that the whole transaction between Allen and Smith & Cullison was a fraud upon the creditors. We seldom cite authorities upon elementary principles of the law. In view of further questions to be determined, we may say that, even if Smith & Cullison had paid one thousand dollars in cash for the transfer of the property, under the facts of the case the transaction would be fraudulent. If the property be conveyed with the design on part of the vendor, participated in by the vendee, to hinder delay, or

defraud creditors, the vendee's title will not be protected, notwithstanding he paid a sufficient consideration. *Chapel v. Clapp*, 29 Iowa, 191; *Chapman v. Ransom*, 44 Iowa, 377; *Sweet v. Wright*, 57 Iowa, 510; *Williamson v. Wachenheim*, 58 Iowa, 277. In other words, the party to whom such a transfer is made can not even be allowed to participate in the proceeds of the property with good faith creditors. *Wilson v. Horr*, 15 Iowa, 489.

II. The court below found as a fact that the value of the goods and merchandise and other property, including the accounts and notes transferred by Allen to Smith & Cullison by the bill of sale, was four thousand, five hundred dollars. It is strenuously contended that this amount is largely in excess of the actual value of the property. We have given the evidence on that feature of the case a most careful and searching investigation, and our conclusion is that the value, as found by the district court, is not greater than shown by a fair preponderance of the evidence. We may say further, that we think, if there was any error in valuation, it was favorable to the appellants.

III. The court found as a fact that all of the property and notes and accounts went into the possession of the appellants. This finding is claimed to be contrary to the evidence. Here, again, we think there was no error. The evidence shows beyond all question that the goods and merchandise and the notes and accounts were either taken possession of by the appellants or by their agents. Any other finding, under the evidence, would be in direct conflict with the rights which the appellants claim under the bill of sale. It was insisted in the court below, and is claimed here, that the sale was an unconditional and good faith transaction. It is contended that the appellants ought not to be held as garnishees, because they did not have possession of the property. It is true that a garnishee is only held for debts owing to the defendant in the action, and for property in his possession or under his control. The true inquiry in such cases is, was the garnishee in possession or had he the control of the property in controversy when he was garnished? We find as a fact, concurring with the district court, that when the appellants were served with the notice of garnishment, it was their duty to call a halt, and hold all of the property included in the bill of sale to await the result of the litigation. They preferred to take the other course, and sell the property, collect the notes, and apply the proceeds in payment of the two chattel mortgages. They were not thereby released of their obligations to the creditors of Allen. It is to be remembered, and we base the decision of this question largely upon the consideration, that this is a case in equity, and all the questions involved are required to be determined upon recognized equitable principles. The rule by which the appellants seek to exonerate themselves from liability, and the authorities which they cite, have no application to the facts of this case. It is the rule applicable to a strict garnishment, where the garnishee has possession of the property, and not to a case where he is found to be in possession of property by a fraudulent transfer. The case at bar, upon the issues made and the agreement of the parties, is more like a creditors' bill than a strict garnishment.

IV. It was found by the court that the chattel mortgage from Allen to Humphrey and Mrs. Allen was fraudulent and void as to the creditors of Allen. The ground upon which this finding was based is not clearly disclosed in the finding of the learned district judge who heard the cause. But other findings of fact make it quite evident that this mortgage was thought to be fraudulent, because it was purposely and intentionally withheld from the record from April 6, 1889, the date of its execution and delivery, to the twenty-fourth day of July, in the same year. It was found by the court that "it was agreed between the parties, at the time, that said mortgage should not be filed for record, in order that the mortgagor's credit might not thereby be impaired, and his business imperiled." It is contended by the appellants that the evidence does not show that any such agreement was made. It is probable that the finding would admit of some doubt if the evidence of witnesses alone should be considered; but when that evidence is supplemented by the fact that the mortgage was so withheld from record, and no reason appears therefor, there is no other conclusion than that the purpose was to maintain the credit of Allen. This fact being found, the mortgage was fraudulent and void as to the other creditors. The record shows that the goods purchased by Allen of the parties herein who are contesting the bill of sale were for the most part, if not all, bought after the mortgage was executed and delivered, and before it was recorded. It was held by this court in *Goll & Frank Co. v. Miller*, 87 Iowa, 426, that such a transaction was fraudulent as to creditors; and that case was followed in *Falker v. Lineham*, 88 Iowa, 641.

V. Humphrey was not made a party to any of these actions, and it is claimed that the court had no power to determine the validity of his mortgage without having personal jurisdiction of him. We think that the appellants are in no position to raise that question. The transfer to them being a fraud upon the creditors of Allen, and his property being in their hands wrongfully, the fact that they paid for the property in part by discharging Humphrey's mortgage can not be held to exonerate them from the fraud, any more than if they had paid the amount of the mortgage to Allen. As we have seen, a fraudulent grantee is not protected, even to the amount which he has paid for the property. If the appellants have paid money in furtherance of the design to hinder and delay creditors, they must resort to the parties to whom the money was paid. It was not incumbent on the creditors to make Humphrey a party to this suit.

Other questions are made in argument, or rather other phases of the question we have considered are discussed. We think we have sufficiently elaborated every material question in the case. The examination of the record has been attended with no little difficulty, by reason of a disagreement of counsel as to the correctness of abstracts, which has compelled us to examine the transcript of the evidence to some extent.

It is claimed by the appellants that the costs of appellees' abstracts, and of the transcript which was required by the conflict of abstracts, ought to be taxed to appellees. We do not concur in that view. It appears to us that the appellees were justified in filing an abstract. It is

possible that it contained more printing than was necessary, but the excess is so inconsiderable that we do not think costs should be taxed therefor.

The decree of the district court is **AFFIRMED**.

THOMAS BARTON V. DISTRICT COURT OF MAHASKA COUNTY.

LIQUOR NUISANCE: CONTEMPT: CONTINUANCE: GROUNDS.

Certiorari to Mahaska District Court.—HON. D. RYAN, Judge.

THURSDAY, JANUARY 25, 1894.

CERTIORARI proceedings to test the legality of an order punishing the plaintiff for a contempt.—*Affirmed*.

Listen McMillen for plaintiff.

Byron W. Preston for defendant.

ROBINSON, J.—On the eighth day of March, 1893, the plaintiff was adjudged guilty of a contempt of court in violating a decree which had been rendered against him restraining the maintenance of a nuisance by the keeping for sale and selling of intoxicating liquors in violation of law, in a building specified. He was adjudged to pay a fine of seven hundred dollars and costs, and to be imprisoned until the fine should be paid, not exceeding two hundred and ten days.

I. The petition for the writ of certiorari is based upon eight grounds, only three of which are urged by counsel in argument. The first of those is stated as follows: "*Second*. The defendant was on the stand as a witness for himself, and refused to criminate himself on cross-examination, and the court convicted him because he refused to criminate himself, and such action on the part of the court was illegal." On this ground it is sufficient to say that it is explicitly denied by the defendant in its return to the writ, and is not sustained by the record. There was direct evidence of the guilt of the plaintiff, upon which his conviction was undoubtedly based.

II. The next ground of the petition urged is that, "*third*, the court erred in overruling defendant's application for continuance, and acted illegally therein." The return shows that the information charging the defendant with the contempt in question was presented to the defendant on the eighth day of March, 1893; that an order was thereupon issued, which fixed the time for hearing the charge at seven o'clock in the afternoon of the tenth day of that month. A short time before that hour the defendant appeared in court by his attorney, and stated that he had an engagement for seven o'clock, but would be ready for trial at eight, and thereupon, at his request, the hearing was set for eight o'clock. The parties appeared at the time fixed, and proceeded with the hearing. When

the state rested, the defendant presented the affidavit of his attorney and application for a continuance. The substance of the affidavit was that the attorney was employed in the case only the day before, and had been unable to ascertain who the witnesses against his client were, and what their testimony would be, until that evening. That he had been informed by his client that he could rebut the testimony of one of the witnesses against him if a continuance until the next Wednesday should be granted, and that he desired to introduce impeaching witnesses. We do not think sufficient diligence to prepare for the hearing was shown, and the court did not err in refusing a continuance.

III. The third ground of the petition which is discussed is stated as follows: "*Fourth.* The court erred in overruling defendant's motion to set aside the submission of the cause and permit the introduction of evidence in behalf of the defendant." The facts on which that ground is based appear to be that at the close of the hearing the shorthand reporter was ordered to make a transcript of his notes of the case, and the fifteenth day of March was fixed for rendering judgment. On that date the judge of the court was in Oskaloosa for a short time for the purpose of rendering judgment, and the plaintiff there presented to him affidavits attacking the reputation for truth and veracity of one of the two witnesses who had testified to facts showing a violation of the injunction, and his general moral character, and attacking the reputation of the other witnesses for truth and veracity, and his competency on account of alleged mental defects. These affidavits were accompanied by the application and affidavit of the plaintiff to set aside the submission of the cause and permit him to introduce the testimony of the witnesses whose affidavits were given. The affidavit of the plaintiff stated that he could prove that the alleged sale of intoxicating liquors which one of the witnesses had testified to had never been made, and could impeach both of the witnesses. The application was resisted by a counter affidavit, and was denied. While the showing of the application is in some respects unusually strong, yet we do not think due diligence to prepare for the hearing on the tenth day of March is shown by the plaintiff. Without any suggestion of insufficient time for preparation, the plaintiff, by his attorney, had the hour originally fixed for the hearing changed to suit his convenience. He does not seem to have made any preparation of consequence for the hearing. The witnesses whose testimony and character are assailed, and also the plaintiff, were examined in open court. An examination of the entire record leaves us with the impression that the plaintiff was seeking to delay, rather than to prepare for, a hearing. The showing of error in the action of defendant is not sufficient to justify us in disturbing the judgment. **AFFIRMED.**

JOHN COPELAND, Appellee, v. SULLIVAN SAVINGS INSTITUTION,
Appellant.

UNCONDITIONAL CONVEYANCE INTENDED AS MORTGAGE: EVIDENCE.

Appeal from Fremont District Court.—HON. H. E. DEEMER, Judge.

THURSDAY, JANUARY 25, 1894.

THIS is an action at law to recover damages of the defendant for the value of the landlord's share of certain crops which the plaintiff claims the defendant wrongfully removed from a farm of eighty acres, of which farm the plaintiff claims to be the owner. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

J. M. Hammond and William Eaton for appellant.

A. E. Brewer and James McCabe for appellee.

ROTHROCK, J.—I. It appears from the record in this appeal that the plaintiff was for many years the owner of the farm upon which the grain was raised which is the subject of this action. Some years prior to 1879 he executed a mortgage upon the farm to the defendant to secure the payment of a loan of money. On the twentieth day of July, 1879, he executed a conveyance of the land to A. E. Brewer, one of his counsel in this case. This conveyance was in proper form, and by its terms it transferred to Brewer all of the plaintiff's claim and interest in the land. An action was commenced to foreclose the mortgage. The plaintiff herein and Brewer were both made defendants, and, although some of the pleadings in that action have been lost, there is sufficient evidence to show that the plaintiff herein sought, by an answer, to reduce the amount secured by the mortgage by a claim of usury. The case was prepared for hearing, and, at about the time of trial, counsel for the plaintiff therein dismissed the action as to Copeland, the mortgagor, and took a decree of foreclosure against said Brewer and the land. A special execution was issued, and the land sold to the defendant herein, and on the fifth day of January, 1887, a sheriff's deed was made to the defendant. The defendant's son was, and had been, in possession of the land. No actual change of possession took place after the execution and delivery of the sheriff's deed, but the plaintiff's son entered into a written lease of the land with the defendant herein for the years 1887 and 1888. He delivered to the defendant the share of the crop for the year 1887, and it is for the grain thus delivered that this action was brought. The petition in the case was filed December, 1888, and the claim is made therein that the deed to Brewer was not intended as an absolute conveyance, but was executed and delivered merely as security for money due, and to become

due, to Brewer for his services as attorney for said Copeland, and that the defendant, the Sullivan Savings Institution, had notice before it took its decree against Brewer and the land, that the said deed was in fact a mortgage, and not a conveyance. The defendant took issue upon these averments of the petition, and the trial in the district court was mainly upon the testimony of witnesses as to the character of the deed, and as to whether the defendant had notice that the instrument was a mortgage, and not a conveyance. The court instructed the jury to the effect that, if it was a mortgage, the plaintiff was entitled to recover the value of the landlord's share of the grain. The plaintiff relied mainly upon the testimony of Brewer, not only as to the character of the deed, but to prove that the defendant had notice that it was intended by the parties thereto merely as security for the payment of money. The suit for foreclosure of the mortgage was conducted for the plaintiff therein by the law firm of Stow & Hammond. After the decree of foreclosure was entered, and before this suit was tried, Stow died. On the face of the record in the foreclosure suit, Copeland had no right in the land. He had conveyed it to Brewer, and Brewer was made a party because the record of deeds showed that he was the owner. It is said that the suit was dismissed as to Copeland because of the defense of usury which he interposed. So far as appears in the record of that case, Copeland was not a necessary party to a foreclosure, and the subjection of the land to the payment of his debts.

The plaintiff in this action was required, in order to recover, to show a most unreasonable and unlikely state of facts. It was claimed that the notice of the character of the instrument was given verbally by Brewer to Stow. If this is true, Stow & Hammond, with full knowledge that Copeland was the owner of the land, and Brewer a mere mortgagee, dismissed the case as to Copeland, and took a decree against Brewer alone. Of course, such a state of facts might be true, and there might be such a case made as would justify such a finding. J. M. Hammond, of the firm of Stow & Hammond, a witness for the defendant herein, testified positively that Brewer filed an answer in the foreclosure suit, in which he pleaded that he was the owner of the land by his conveyance from Copeland. Brewer testified as positively that he did not file an original answer. It is conceded that Brewer did file an answer at the time of the trial. That answer, or a copy of it, was introduced in evidence, and is in these words:

"*First.* Comes now A. R. Brewer, one of the defendants herein, and, for amendment to his answer hereinbefore filed, alleges that at the time John Copeland sold and deeded the land described in plaintiff's petition to A. R. Brewer, that it was expressly agreed by and between them (said defendant Copeland and this defendant) that in case the plaintiff should bring suit against said Copeland, or against Copeland and this defendant, or against the defendant A. R. Brewer or his grantee, to foreclose the mortgage mentioned in plaintiff's petition, then, in that case, said A. R. Brewer or his grantees should have the right and consent 'of said defendant Copeland to interpose against said note and mortgage, the plea of

usury against plaintiff or his assignees; that it was part of the consideration of the purchase of said land by defendant Brewer of Copeland that said A. R. Brewer should have the right and consent of said Copeland to interpose the plea of usury against said note and mortgage. Wherefore this defendant asks that he be allowed to plead usury against said note and mortgage, and that he have the relief prayed for in the answer of defendants, hereinbefore filed.

A. R. BREWER.

"I, A. R. Brewer, being sworn, say that I have read the foregoing answer, and the same is true, as I verily believe. A. R. BREWER."

This paper not only purports to be an amendment, but it expressly states that there was an answer "hereinbefore filed." Not only that, but all through this answer the claim is made that the conveyance to Brewer was a purchase of the land. When Brewer was confronted with this amendment to his answer, he was called as a witness in rebuttal, and his testimony in chief, as to the amendment, was as follows:

Question. Now, a purported copy of a plea filed by you on the twentieth day of May, 1885, was introduced here yesterday. You may state to the jury how you came to make that plea, and what you meant to be understood by the language you used in it. (Objected to as incompetent, immaterial, and not rebutting. Objection overruled. Defendant excepts.)

Answer. I made the plea in the interest of John Copeland. We intended to assert that he had, in making the conveyance, conveyed the right to plead for him the plea of usury. I understood it that way, that he could convey his right, his personal right, to plead usury, his personal right to make such plea. (Defendant asks to have the evidence taken out, for the pleading, of itself, sets up he had the right. Overruled, and defendant excepts.)

Question. Now, you may explain to the jury what you thought, at the time, the law was as to the consideration given in the transaction out of which the deed or mortgage arose, for the interposition of the plea by the grantee of usury. (Objected to as incompetent, immaterial, not rebutted, and because it is a matter upon which the pleadings are not ambiguous, and also a conclusion given the intent of the witness. Objection overruled, and defendant excepts.)

Answer. I understood, at that time, the grantee, with the consent of the grantor, could interpose the plea of usury for the grantee or for himself, by reason of the consent of the grantor or grantors.

Question. Now, what was your idea about the consideration that moved a mortgage constituting a consideration for the grant of the right to interpose the defense of usury? (Same objection. Overruled, and defendant excepts.)

Answer. I believed the grantee had the right, by reason of taking another second mortgage, to interpose the plea of usury to the] first mortgage.

Question. You may state why you use the language in the plea that that part of the consideration of the deed that had been executed to you was the right to interpose the defense of usury. (Same objection. Same ruling, and same exception.)

Answer. At the time he made the conveyance he directed me to make the plea of usury. I said that because he had requested me to make that plea."

The objections to all this line of examination ought to have been sustained. It was not competent for the witness to state what he intended

by the amendment to the answer. Its language was plain and unambiguous, and by it the record in the foreclosure case showed that Brewer claimed the land as a purchaser, and, so far as appears, Copeland took no issue with him. The plaintiff in that action could not be prejudiced by Brewer's understanding of what the law was, even [though he should maintain that understanding with his solemn oath.

II. It is claimed by the appellant that the verdict is not supported by the evidence. We think this claim is well founded. It is to be remembered that the plaintiff seeks by this action, which is an indirect and collateral proceeding, to impeach by parol evidence a title to land which, upon the record made in the foreclosure suit, is in all respects valid. Without setting out and discussing all the evidence, we have to say that an examination of the whole record satisfies us the verdict ought not to stand.

III. The appellee submitted a motion with the case to dismiss the appeal. It is based upon the ground that no record exists from which an appeal can be taken, and that the appeal has been abandoned by the institution of another action by the appellant. The motion will be overruled because the grounds thereof are not supported by any facts. The judgment of the district court is REVERSED.

TAMA WATER POWER COMPANY, Appellant, v. JOHN RAMSDELL *et al.*,
Appellees.

90 747
100 732

PROMISSORY NOTE: SIGNATURE: CONSTRUCTION.

Appeal from Tama District Court.—HON. C. A. BISHOP, Judge.

THURSDAY, MAY 19, 1892.

ACTION upon three promissory notes. There was a demurrer to the petition, which was sustained, and the petition was dismissed. Plaintiff appeals.

W. H. Stivers and *J. W. Willett* for appellant.

Struble & Stiger for appellees.

ROTHROCK, J.—I. This cause was submitted to this court upon the arguments made in the case of *Day v. Ramsdell*, *ante*, p. 731. Counsel concede that the two cases involve the same questions. There is an abstract in this case which shows that two of the notes in suit are in the same form as the notes in the other case. The note for six hundred and fifty-nine dollars and thirty-three cents, dated March 30, 1885, is not in the same form. The word "we" is not in that note. So that it appears to be an undertaking that the Tama Water Power Company would pay the amount

named in the note. This variance may be an error in the abstract. However that may be, the defendants will not be prejudiced in the further progress of this case.

II. There is another difference in the notes, in this: There was the impression of a seal upon each of the notes in this case, with the words, "Tama Paper Co., Tama City, Iowa," thereon. In the absence of an averment in the petition that the Tama Paper Company was a corporation having a seal, we do not think that the impression of said words upon the notes would control the rights of the parties. What effect this would have, if it should be shown that the Tama Paper Company was a corporation, we do not determine.

The judgment of the district court is REVERSED.

KINNE, J., having been of counsel, took no part in the decision of this case.

OPINION ON REHEARING.

TUESDAY, JANUARY 23, 1894.

ROBINSON, J.—A rehearing was granted in this case, and in the case of *Day v. Ramsdell*, 57 N. W. Rep. 630, (decided during the present term of court), at the same time. What we have said in the opinion on rehearing in that case is applicable to this, and need not be repeated. The impression of the official seal of the Tama Paper Company on the notes involved in this action does not show that the notes are not the personal obligations of the defendants, in view of the averments of the petition that they made the notes to the plaintiff. In the first division of the former opinion, in referring to the form of one of the notes in suit, we inadvertently used the name of the plaintiff. As is evident, we intended to designate the Tama Paper Company. We conclude that our former opinion should be adhered to, and the judgment of the district court is therefore REVERSED.

GRANGER, C. J.—I adhere to the views expressed in the dissenting opinion in *Matthews v. Mattress Co.*, 87 Iowa, 246.

KINNE, J., took no part in the determination of this cause.

TOLEDO SAVINGS BANK, Appellee, v. W. S. JOHNSON & COMPANY *et al.*,
Appellants.

ATTACHMENT LEVY: COSTS AND EXPENSES.

Appeal from Tama District Court.—HON. J. R. CALDWELL, Judge.

THURSDAY, JANUARY 25, 1894.

ACTION on four promissory notes aided by attachment. The notes aggregated, at their maturity, three thousand, seven hundred dollars. The prayer of the petition was for "judgment against said defendants for thirty-seven hundred dollars, and for costs, with eight per cent. interest after the maturity of said notes, and for attorney's fees, as provided for in said notes," etc. The recitals in the writ of attachment are, in part, that a petition has been filed claiming of the defendants "the sum of three thousand, seven hundred dollars, money due on promissory notes," and directs as follows: "Now, therefore, you are hereby commanded to attach of the goods and chattels * * * of the above named defendants * * * so much thereof as may be necessary to satisfy said amount of three thousand, seven hundred dollars, attorney's fees, and costs," etc. The property seized by virtue of the writ was of the estimated value of four thousand dollars, and consisted of a "general stock of goods, wares, and merchandise." The defendant moved the court to quash and set aside the writ of attachment for reasons to be noticed in the opinion, which the court overruled, and afterward gave judgment for the plaintiff, from which the defendants appeal.—*Affirmed.*

W. H. Stivers and *J. W. Willett* for appellants.

Struble & Stiger for appellee.

GRANGER, C. J.—I. The appellant complains of the action of the court in refusing to set aside the writ of attachment. The ground of the motion as presented in argument is that the writ is indefinite in not stating "the requisite amount of property to be attached, which must be the amount sworn to by the plaintiff in the petition to be due." Of the notes in suit but one was due at the commencement of the action, and the action as to the other notes was because of the disposition of property authorizing an attachment. The petition states that "there is now due" on the matured note one thousand dollars, and that on the unmatured notes "there will be due and payable when they mature" two thousand, seven hundred dollars, aggregating three thousand, seven hundred dollars; and this is what the appellants regard as sworn to by the plaintiff to be due. It will be seen that the writ directs the sheriff to attach property to satisfy three thousand, seven hundred dollars, "with interest, attorney's fees, and costs," and it is because of the interest, attorney's fees, and

costs that the writ is regarded as indefinite, because the amount thereof is left for the determination of the sheriff, and they are not sworn to in the petition as due the plaintiff. Chapter 1 of title 18 of the Code is "Of Attachments and Garnishments." Sections 2953 and 2954 of the Code are of that chapter, and are as follows:

"Sec. 2953. If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount, which must be more than five dollars in order to secure an attachment.

"Sec. 2954. The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent. greater in value than that amount."

When the petition was filed no more was due than three thousand, seven hundred dollars, and there was a compliance with the provisions of section 2953. It could not at that time be known how much would become due as interest, nor what costs would accrue; and hence it was not "practicable" to include them in the amount sworn to be due. They were not due, but still they were items to be included in the judgment, and for which the attachment was to provide a means of payment. As we view the law, the sheriff in levying the writ took no notice of the interest, fees, and costs, but only of the three thousand, seven hundred dollars sworn to as due, and then he added, or was authorized to add, fifty per cent. of that amount, and from the amount thus in his hands he was to satisfy the amount sworn to as due, with the added items of interest, fees, and costs. There is little room to doubt the correctness of the conclusion. There was no error in refusing to quash the writ.

II. The return of the sheriff to the writ of attachment shows that because perishable, and to avoid such "expense as to greatly depreciate the amount of the proceeds to be realized therefrom," he sold the stock of goods, and, in addition to the regular fees allowed by law, he asked to be allowed six hundred and ninety-five dollars and twenty-five cents as "necessary expenses attending the levy and sale," which the district court allowed. The goods, after the levy, were removed to another room, at the request of the plaintiff, for greater safety, and one item of the expense is for room rent and another for a person to watch the goods day and night for twenty-nine days. The items of expense are quite numerous, the largest being for an auctioneer for fifteen days, two hundred and twenty-five dollars. Complaint is made of the allowance of the bill. We think the items are all of a class for which extra compensation could be allowed. It does seem to us that this stock of goods should have been disposed of at a much less expense to the defendants. The supply of help was very liberal, and in some cases the amounts paid. If the question were triable here anew, we should hesitate before affirming the order of approval. The evidence, however, is such that the findings below conclude us, and no good purpose is to be subserved by a discussion of the evidence to show it. The judgment is **AFFIRMED**.

KINNE, J., took no part.

PEROTTE & FRENCH v. I. J. TOLBERT, Appellant.

MECHANIC'S LIEN: COUNTERCLAIM HELD TO EQUAL THAT OF PLAINTIFF: JUDGMENT REVERSED AND GIVEN TO DEFENDANT, COSTS TO BE PAID BY HIM, EXCEPT THOSE OF NEEDLESS AMENDMENT TO ABSTRACT AND TRANSCRIPT NECESSITATED THEREBY.

Appeal from Dallas District Court.—HON. J. H. APPLGATE, Judge.

WEDNESDAY, JANUARY 31, 1894.

ACTION to recover for labor and for material used in the improvement of a dwelling house, and to foreclose a mechanic's lien thereon. Judgment was entered in favor of the plaintiffs for twenty-eight dollars and five cents, and for one half of the costs. Defendant appeals. *Reversed.*

Shortley & Harpel for appellant.

Cardell & Nichols for appellees.

GIVEN, J.—I. Appellees denied that appellant's abstract was correct, and filed their "abstract, with corrections and additions," wherein part of the evidence is set out by questions and answers, and also the findings of the court. Appellant denied appellees' abstract, and the denial that his abstract is not correct, and filed a transcript of evidence covering one hundred and fifty-eight pages. Appellant moves to tax the costs of appellees' abstract and of the transcript to appellees. The questions in the case are exclusively questions of fact, and, therefore, require that the substance of all the evidence relating to the disputed questions should be shown in the abstracts. Our comparison of the two abstracts fails to disclose any material part of the evidence stated in appellees' abstract to have been omitted in appellant's. Our comparison of appellant's abstract with the transcript leads us to the conclusion that the evidence is sufficiently set out therein. Of the fourteen pages of appellees' abstract, one and one half contain the findings of the court, which are omitted from appellant's abstract. Except as to this, appellees' abstract was unnecessary, and necessitated a filing of a transcript of the evidence. The motion to tax costs of the transcript and of the additional abstract to appellees is sustained, except as to said one and one half pages of said abstract.

II. These parties entered into a contract in writing as follows: "That the said Perotte & French are to build and complete as follows: One story, to be built new on all the old house, of seven feet; also, a new addition, twelve by eighteen, all complete; a foundation under all the house, including all plastering and painting and new work. The said Perotte & French are to furnish all materials and complete all the work

for the sum of six hundred and thirty-one dollars, to be paid as follows: Sufficient money to be paid each week to pay labor. The balance to be paid when job is completed. And, also, one new porch to be built, included in said job. We are to furnish the labor to put in three registers." Plaintiffs ask to recover one hundred and forty-six dollars and twenty-five cents for thirteen items of extra work and materials, in addition to that called for by the written contract. Defendant admits the written contract, and that he subsequently agreed to pay forty-one dollars and sixty-five cents for six extra windows. He contends that the other items claimed as extras are included in the written contract. He asks to recover six hundred and eighteen dollars and forty-five cents damages by way of counterclaim for defective workmanship and materials in fifteen particulars set out. It is not required, nor would it be proper, that we should consume space in stating or discussing the evidence as to each of these numerous items. The lower court allowed plaintiffs, on their claim, forty-one dollars and sixty-five cents for extra windows, as admitted; fifteen dollars and ninety cents for painting old building; one dollar and fifty cents, shelving closet; eight dollars, extra work on porch; and one dollar for putting in thresholds and repairing locks; making in all sixty-eight dollars and five cents. Plaintiffs asked fifty-two dollars and fifty cents for the painting, but the evidence shows that, while the material was good, it was poorly put on. Under the evidence, fifteen dollars and ninety cents was the reasonable value of the painting. We are in no doubt of plaintiffs' right to recover the amount found as to these items, except one dollar and fifty cents for shelving closet. This closet, we understand, was in the new part, which plaintiffs were to build, and, therefore, included in the written contract. The other items of plaintiffs' claim are clearly covered by the contract, and should not be allowed as extras. Sixty-six dollars and fifty-five cents is all that should be allowed to plaintiffs on their claim. Defendant's complaint as to the material and workmanship is certainly not without reason. The materials were not as good as required, in one or two particulars, and the workmanship defective in many more. It is true the work was in reconstructing and adding to an old house, the construction of which accounts for many of the matters complained of, and for which plaintiffs are not accountable. It was certainly not contemplated by the parties that the house, when reconstructed, would be as perfect as an entirely new building. The evidence clearly shows that the new rooms were not square, the new walls were not plumb, and the upper floors were shaky, for want of sufficient joists. These defects are not attributable to the fact that it was an old house. Ordinary skill and care in the workmanship would have avoided these defects, in part at least, and especially as to the upper floor. Plaintiffs contracted to put on another story. This included the floor. And they were required to put in joists in sufficient number and of sufficient size, which they did not do. These defects are difficult to remedy, and affect the value and usefulness of the house. It is true, as said by the learned judge who tried the case, that "it is not an easy task to say just what sum will fully compensate him for these defects." The lower court allowed the defendant forty dol-

lars on his counterclaim. The evidence seems to us to entitle him to a larger sum. Had that house, old as it was, been reconstructed with suitable materials, and in a workmanlike manner, it would surely be worth more than forty dollars over what it was worth as left by the plaintiffs. It is clear that forty dollars would not remedy the defects. Our conclusion is that defendant should be allowed sixty-six dollars and fifty-five cents on his counterclaim, and judgment against the plaintiffs; costs, except as herein ordered, to be taxed to the defendant. **REVERSED.**

STATE OF IOWA V. ALFRED BOONE, Appellant.

TRANSCRIPT EXHIBITS NO ERROR.

Appeal from Johnson District Court.—HON. S. H. FAIRALL, Judge.

THURSDAY, FEBRUARY 1, 1894

Affirmed.

The Attorney General for the state.

PER CURIAM.—Appellant pleaded guilty to an indictment charging him with willfully, maliciously and feloniously cutting, breaking and injuring three telegraph wires owned by the Western Union Telegraph Company, and in the possession, use, and control of the Chicago, Rock Island & Pacific Railway Company. Judgment was entered that he be confined in the state penitentiary at Anamosa at hard labor for a term of eighteen months, and for costs. Defendant appealed, and the case is submitted on a transcript alone. We have examined the transcript with care, and fail to discover therefrom any errors in the proceedings. The judgment of the district court is, therefore, **AFFIRMED.**

STATE OF IOWA V. WALTER SHERRY, Appellant.

ADULTERY: EVIDENCE WARRANTS CONVICTION: NO ERROR IN INSTRUCTIONS.

Appeal from Muscatine District Court.—HON. A. HOWATT, Judge.

THURSDAY, FEBRUARY 1, 1894.

INDICTMENT for adultery. Trial by jury, and a verdict of guilty, and the defendant appealed.—*Affirmed.*

THE cause was submitted by the attorney general for the state on a transcript of the record and evidence.

No appearance for appellee.

PER CURIAM.—The record in this case seems to be complete, including the indictment, evidence, and charge of the court. While the evidence is conflicting in some particulars, and the criminal act charged is shown only by circumstantial evidence, it is of a character to fully warrant the finding of the jury. The charge of the court was fair to the defendant, and we discover no error in the record. The judgment is **AFFIRMED**.

90	754
141	523
90	754
143	550

S. D. KENNEDY V. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Appellant.

CIRCUMSTANTIAL EVIDENCE CLEARLY SHOWING THAT AN ANIMAL WAS STRUCK BY A PASSING TRAIN: VERDICT FOR PLAINTIFF NOT DISTURBED.

Appeal from Clinton District Court.—HON. P. B. WOLFE, Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION to recover double the value of a bull alleged to have been killed on defendant's right of way because of the same not being fenced. Answer, general denial. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

Hubbard & Dawley for appellant.

Pascal & Armentrout for appellee.

GIVEN, J.—The only contention is whether the evidence supports the verdict. There is no question but that the bull got upon the right of way through an opening in the right of way fence, and fell or was thrown from a bridge, and injured so that it had to be killed. No one is called who witnessed the accident, and therefore the cause has to be determined from the circumstances. Appellant cites the rule as announced in *Asbach v. Railway Co.*, 74 Iowa, 248, 37 N. W. Rep. 182, as follows: "A theory can not be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory." We have examined the evidence with care and conclude that it fully warrants the finding of the jury. The evidence as to the tracks of the animal with reference to the bridge, the marks on the ties, and injuries upon and the position of the bull, and the

number of trains that passed that night, precludes every other conclusion as reasonable, except that the bull was struck by a passing train at the point to which his tracks were nearest the bridge, and carried onto and dropped over the bridge at the point where he was found. **AFFIRMED.**

JOHN O. OSMUNDSON V. THOMPSON BROTHERS *et al.*, Appellants.

90	755
92	392

SUFFICIENT CONSIDERATION FOR CONTRACT. Misconduct which prevents the collection of all of a lot of accounts will not excuse nonperformance of an agreement to turn over such as were collected. Evidence held too weak to warrant reformation of an agreement.

Appeal from Winnebago District Court.—HON. JOHN C. SHERWIN, Judge.

FRIDAY, FEBRUARY 2, 1894.

ACTION on a written contract. Judgment for plaintiff. Defendants appeal.—*Affirmed.*

C. H. Kelley for appellants.

A. C. Ripley and *C. L. Nelson* for appellee.

KINNE, J.—I. Plaintiff, as assignee of one O. J. Anderson, sues defendants upon the following written contract entered into between said Anderson and defendants:

“FOREST CITY, IOWA, Aug. 22, 1890.

“It is understood between Ole J. Anderson and Thompson Bros. that the first \$100.00 collected by Thompson Bros. of the owners of the cattle in the Simianer herd shall be paid to Ole J. Anderson; then, after that, the next money collected shall go to Thompson Bros. until their \$600 note for use of range is paid, after which the balance due Anderson shall be paid. Thompson Bros. to be held liable for nothing, neither for the collection of the money nor for the payment of water privilege; but, if they collect any money, it shall be applied as above.”

This agreement was signed by both parties. It was averred in the petition that defendants had collected the one hundred dollars; that plaintiff owned the claim, and had demanded payment of defendants, which had been refused. In an amended answer, defendants admit the collection of the one hundred dollars; aver that Anderson has been fully paid by Simianer or the owners of the cattle, and pleaded that the contract was without consideration. In a second count it is averred that defendants rented a ranch to Simianer, and that Anderson made a contract with the latter to water their cattle; that defendants had a written contract with Simianer whereby the herding accounts were assigned to them; that the agreement in fact made with Anderson was that, if defendants collected

all of said herding accounts, Anderson should have the first one hundred dollars, then defendants should have the next six hundred dollars, then Anderson should have whatever more was due him; that said writing, by mistake, did not express the contract really made. It is asked that the writing be reformed in that respect. It is also averred that Anderson collected part of the money which was to be collected by defendants. The cause was tried as an equitable action, and judgment rendered for plaintiff for the amount claimed.

II. It is claimed the contract between Anderson and defendants was without consideration. It appears that defendants had rented to some men named Simianer a large tract of grass land in Wright county, upon which they were to, and did, herd cattle belonging to various parties; that, during the season, water for the herd became scarce, and defendants made the contract set out with Anderson for the purpose of having him furnish water. The furnishing water for the herd was a sufficient consideration for the contract.

III. It may be conceded that Anderson, plaintiff's assignor, acted in bad faith toward defendants, in that he seems to have connived with the Simianers for the purpose of enabling them to prevent defendants from collecting all of the herding accounts; but we do not see how that can affect the right of recovery in this action. Defendants, by the terms of their written contract, agreed to pay Anderson the first one hundred dollars collected by them for herding the cattle. They have collected almost three hundred dollars, and have paid him nothing. Unless defendants are entitled to have the contract reformed as prayed, they have established no defense to this action. We need not set out the evidence relating to the claimed mistake. It is weak and unsatisfactory. It is not of that clear and satisfactory character necessary to warrant a court of equity in reforming a written instrument. Written contracts would be worth but little if they could be set aside on the meager showing made in this case. We have no hesitancy in holding that no case was made justifying a reformation of the written instrument, and the court below properly rendered judgment against defendants. **AFFIRMED.**

JOHN S. PEARSON V. DISTRICT COURT OF CASS COUNTY.

CONTEMPT: LIQUOR NUISANCE. One who unlawfully sells liquor in a certain place is not in contempt of an injunction to which he was no party, and which restrained another from selling in said place. *Buhlmon v. Humphrey*, 86 Iowa, 597, and *Newcomer v. Tucker*, 56 N. W. Rep. 499, followed.

Certiorari to the Defendant, Directed to WALTER I. SMITH, as Presiding Judge.—Reversed.

FRIDAY, FEBRUARY 2, 1894.

Rockafellow & Scott for petitioner.

No appearance for respondent.

GRANGER, C. J.—The return to the writ shows that the petitioner was adjudged guilty of contempt for the violation of an injunction issued in an action wherein the state of Iowa was plaintiff and S. J. Applegate was defendant, and in which this petitioner was not a party. The facts in this case bring it clearly within the rule announced in *Buhlman v. Humphrey*, 86 Iowa, 597, 53 N. W. Rep. 318, which was since followed in *Newcomer v. Tucker*, 56 N. W. Rep. 499. The rule of these cases has been announced since the trial of the contempt proceeding in the district court. Following the rule of those cases, the writ in this proceeding is sustained, and the judgment REVERSED.

JOHN MARA V. JOHN BUCKNELL, Appellant.

EVIDENCE NOT PRESERVED BY BILL OF EXCEPTIONS: ASSIGNMENT OF ERRORS TOO GENERAL.

Appeal from Winnesheik District Court.—HON. W. A. HOYT, Judge.

TUESDAY, FEBRUARY 6, 1894.

ACTION to recover damages for the breach of a contract by which the defendant bargained and sold to the plaintiff and one Henry Elliot certain real estate and personal property. There was a trial by jury, and a verdict and judgment for plaintiff for one hundred and sixteen dollars, and defendant appeals.—*Affirmed*.

E. B. Acres for appellant.

Geo. W. Adams for appellee.

ROTHROCK, J.—It appears from the abstract of appellant that the evidence in the case was not preserved by a bill of exceptions, and no evidence, excepting a single item thereof, is set out in the abstract. As it is conceded that there was no bill of exceptions making the evidence of record, the case must be considered here, if at all, upon the pleadings and the instructions of the court. The assignment of errors is in these words: "First, the court erred in giving the instructions it did to the jury; second, the court erred in sustaining objections to the defendant's testimony; third, the court erred in overruling defendant's motion for new trial; fourth, the verdict is contrary to law." We have repeatedly held that assignments of error in this general form are insufficient to raise any question in this court. We need not cite the cases. See Code, section 3207, and cases collected in *McClain's Digest*. The judgment of the district court is AFFIRMED.

90	757
92	6
90	757
123	833

C. W. FILLMORE v. CARL HINTZ and SOPHIA HINTZ, Defendants; J. L.
CASE THRESHING MACHINE COMPANY, Appellants.

APPEAL DISMISSED: LESS THAN ONE HUNDRED DOLLARS IN CONTROVERSY:
NEEDLESS AMENDMENT TO ABSTRACT AND RESULTING TRANSCRIPT TAXED
TO APPELLER.

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

TUESDAY, FEBRUARY 6, 1894.

ACTION in equity for judgment on three promissory notes aggregating three thousand, three hundred and sixty dollars, executed by the defendant Carl Hintz to Doris Peters or order, in consideration for certain land purchased from William Peters. Also for decree foreclosing a mortgage on said land, executed by the defendants to secure said notes. The plaintiff alleges that said notes were transferred to him before maturity, and that he is the owner thereof. The defendants answered, admitting the execution of said notes and mortgage, and alleging as defense, in substance, as follows: That, at the time of the execution of said notes and mortgage, they were deposited with the plaintiff in pursuance of a written agreement set out, to be held by him in trust; that if said Doris and William Peters would perfect the title to said land within one year, and present a satisfactory abstract, the money paid and the notes and mortgage were to be delivered to Doris and William Peters, otherwise they were to be returned to Carl Hintz. The defendants allege that the plaintiff has no other interest in said money and notes, and that the title to said land was not perfected as agreed upon. Plaintiff, in reply, denies that the title was not perfected, and alleges that he notified the defendants that he was going to turn over said money, notes and mortgage, and that no objection was made. Intervener, after alleging that William Peters was indebted to it on two promissory notes for two hundred and twenty-six dollars each, one due January 1, 1889, and one January 1, 1890, alleges, in substance, as follows: That at the time the two hundred dollars was paid by the defendants on the land and said notes and mortgage were executed and deposited with the plaintiff, to wit, December 4, 1888, it was agreed between the plaintiff, F. H. Helsel, attorney for intervener, and Doris and William Peters that the notes of defendant were, in fact, the property of William Peters; that the plaintiff should hold the same until the title to said land should be perfected, and, if the same should be perfected, and the notes become the property of William Peters or Doris Peters, that they should still be held by plaintiff, and whatever payment should be made on the same should be turned over to intervener on said two notes until the same were paid; that in conformity with said agreement intervener received from plaintiff, on or about April 11, 1889, for William and Doris Peters, two hundred and forty dollars out of the proceeds of the sale of said land; "that on or about the time the interest became due on the notes sued on by the plaintiff the

said defendant, Carl Hintz, told O. W. Fillmore that he was ready to pay the interest on said notes if he could have the same indorsed, and the said Fillmore said he did not know where they were, and the said Carl Hintz deposited the money—two hundred and thirty-five dollars and twenty cents—in the Farmers' Bank at Peterson, Iowa; that on or about the twenty-second day of May, 1890, your intervener received from said Doris Peters an order in writing, as follows:

"SALEM, Oregon, May 22nd, 1890.

"Pay to the order of the J. I. Case Threshing Machine Co., of Racine, Wis., two hundred and thirty-five and 20-100 dollars, or amount deposited in my name.

DORIS PETERS.

"To Farmers' Bank, Peterson, Iowa."

"Witness,

E. A. D. SOFKEIN."

That on said order the intervener was paid the interest deposited by Carl Hintz on the notes sued on by the said plaintiff, *vis.*, two hundred and thirty-five dollars and twenty cents; that, after allowing the credits from the sources as aforesaid, there remains due on the first note, and unpaid, the sum of fifty-one dollars and fifty-four cents, and on the second note the sum of four dollars, with interest on both of said notes, together with attorney's fees." Intervener further alleges that, if plaintiff purchased said notes as he claims, he did so with full knowledge of the matters set out in its petition, and subject to said agreement; that William Peters is the actual owner of said notes, subject to said agreements; and that he and Doris Peters are nonresidents of this state. Intervener asks that the notes sued on be declared the property of William Peters, subject to the rights of Carl Hintz and of intervener; that William and Doris Peters be made parties; that intervener have judgment against William Peters in the sum of fifty-five dollars and fifty-four cents, together with interest, attorney's fees, and costs; that a writ of attachment issue against the property of William Peters, and the notes sued on be levied on and sold to satisfy the claims of intervener, or that they be held by the plaintiff, as trustee, for intervener; and that plaintiff's action be dismissed. Plaintiff, in answer to said petition of intervention, admits that William Peters sold the land to Carl Hintz; that he afterwards deeded it to Doris Peters; admits the execution of the notes and mortgage; and that Peters and wife, Doris, executed a deed to Carl Hintz, and that two hundred and forty dollars was paid to intervener. He denies every other allegation in said petition, and specifically denies that an agreement was entered into as alleged. Judgment and decree of foreclosure were entered in favor of plaintiff against the defendant, and judgment dismissing intervener's petition, and for costs. Intervener alone appeals.—*Dismissed.*

Ernest C. Herrick for appellant.

Parker & Richardson for appellee.

GIVEN, J.—I. The first question presented by the record is whether this court has jurisdiction. Code, section 3173, provides: "But no

appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court, but this limitation shall not affect the right of appeal in any cause in which is involved any interest in real property." There is no question but that an appeal would lie from the judgment in favor of the plaintiff against the defendants, but no appeal has been taken from that judgment. The contention is whether the amount in controversy between intervenor and plaintiff exceeds one hundred dollars. It is admitted in the petition of intervention that two payments were made upon the two notes of William Peters to intervenor, one of two hundred and thirty-five dollars and twenty cents, and one of two hundred and forty dollars, and that, allowing these credits, only fifty-five dollars and fifty-four cents, with interest, remains unpaid. It is for this amount that intervenor asks judgment, and that the notes sued upon be held subject to the payment thereof. The notes sued upon provide for seven per cent. interest, payable annually, "principal and interest payable at Peterson Bank, Peterson, Iowa." The petition of intervention shows that, about the time the first year's interest became due, Mr. Hintz informed plaintiff that he was ready to pay the interest if he could have the same indorsed on the notes, and that plaintiff told him that he did not know where the notes were, whereupon Mr. Hintz deposited the sum of two hundred and thirty-five dollars and twenty cents in said bank in payment of said interest. That afterward Doris Peters, to whom the notes were payable, sent the written order set out to intervenor on the bank for said money, and that on said order the same was paid to intervenor on account of the indebtedness of William Peters. Intervenor concedes that, if it is allowed to retain the two hundred and thirty-five dollars and twenty cents, there is less than one hundred dollars due to it, but contends that, as plaintiff denies the trust alleged by intervenor, he is insisting, as against intervenor, that he, and not intervenor, is entitled to said two hundred and thirty-five dollars and twenty cents; therefore, that that amount is in controversy. It will be observed that intervenor admits the receipt of the two hundred and thirty-five dollars and twenty cents, and we think the pleadings fail to show that its right to that amount is questioned by any of the parties to the action. Peters and wife, together with the plaintiff and the defendants, were made parties defendant to the petition of intervention. Neither Peters and wife nor the defendants answered the petition, nor do the defendants make any claim for a credit on account of the deposit of said two hundred and thirty-five dollars and twenty cents as against the plaintiff, nor ask to recover the same from the intervenor. The plaintiff makes no claim to said two hundred and thirty-five dollars and twenty cents, nor does he deny the right of intervenor to keep the same. That payment to intervenor was by direct authority from Mrs. Peters, the payee in the notes, and was made on behalf of her husband, and on account of his indebtedness to intervenor. Whether this payment of two hundred and thirty-five dollars and twenty cents was made in pursuance of the agreement alleged by intervenor or

simply because of the indebtedness of Mr. Peters to intervenor, we need not inquire, nor need we inquire as to the reasons for or effect of not allowing this payment as a credit to defendant Carl Hintz. Our jurisdiction depends entirely upon whether it is shown by the pleadings that there is an amount in controversy exceeding one hundred dollars. As no one questions intervenor's right to retain this two hundred and thirty-five dollars and twenty cents, which it admits having received, it is entirely clear that the amount in controversy between intervenor and plaintiff is much less than one hundred dollars. It follows from this conclusion that the appeal must be dismissed.

II. Intervenor appellant moves to strike all of plaintiff's additional abstract, except the first page and part of the third and ninth pages, and to tax the costs thereof and of appellant's amendment to abstract, and the costs of the transcript of the evidence, to the plaintiff upon the ground that his additional abstract was unnecessary. While the controlling issue between the intervenor and plaintiff was whether the contract alleged by intervenor had been made, the facts relating thereto were so blended with, and based upon the facts bearing upon the issues between plaintiff and defendants that it was difficult to abstract the evidence without including that pertaining to the issues between plaintiff and defendants. While the leaning of the abstracter is apparent in both abstracts, we are led to conclude, upon our careful examination of both abstracts and the transcript, that appellant's abstract was sufficiently full and correct, except as to parts admitted in the motion, and that appellee's additional abstract, except the first page and half of the third and ninth pages, was unnecessary. The filing of this additional abstract rendered appellant's amendment and the transcript of the evidence necessary. We think this motion should be sustained, and that the costs of the additional abstract, except as to two pages thereof, and of the appellant's amended abstract, and the costs of the transcript of the evidence, should be taxed to the plaintiff appellee.

DISMISSED.

LLOYD HINKLE v. WALTER I. SMITH, Judge.

PROVING a sale in first building, "South of Commercial hotel on W. street, Atlantic," is not proof of one on lot 21, block 26. No liability for violating an injunction to which one is not a party, nor for sales made by one believed to be his wife, in his absence.

WEDNESDAY, FEBRUARY 7, 1894.

THIS is an action of *certiorari* to test the legality of certain proceedings wherein the plaintiff was adjudged guilty of contempt.—*Reversed.*

Rockafellow & Scott for plaintiff.

H. G. Curtis, T. B. Swan and J. E. Bruce for defendant.

GIVEN, J.—I. We have no argument in behalf of the defendant. The return of the defendant to the writ shows that on April 9, 1891, a decree was duly entered by the district court of Cass county in the case of the *State of Iowa v. Henry Davenport and Chauncey Slater*, finding that Henry Davenport had maintained a nuisance on lot 21, block 26, Atlantic City, Iowa, as charged in the petition. It was adjudged by the court that the buildings and erections on said lot "are hereby perpetually enjoined, as places for selling and keeping for sale intoxicating liquors in violation of law." Henry Davenport and Chauncey Slater were perpetually enjoined from keeping or using said place for the sale of intoxicating liquors, and Davenport was enjoined from being concerned in the illegal sale of intoxicating liquors within the county or elsewhere within the fifteenth judicial district. The plaintiff contends that the court acted illegally and without jurisdiction in adjudging him guilty of a violation of said injunction in this: That there was an entire want of evidence tending to show that the plaintiff had in any manner violated said injunction; that plaintiff was not a party to the action in which the injunction issued, and it is not addressed to him, nor was he in any way included within the terms of the injunction. The evidence upon which the plaintiff was adjudged guilty of contempt is briefly, and in substance this: One Wallace testified: "Know the Chauncey Slater building on Walnut street, city of Atlantic, Iowa. It is on lot 21, block 26." One Macy testified: "I was in the first building south of the Commercial Hotel, on Walnut street in the city of Atlantic, Iowa, on August 4, 1891. I was alone. I bought one bottle of beer from a young man in there. Don't know his name." On cross-examination he stated that he was in there on August 6, 1891. "Bought some beer the second time from a lady." He was unable to describe the lady, or to say who she was, further than that he was informed that it was Mrs. Hinkle. He stated that Mr. Hinkle was not in there. The only additional evidence was the decree rendered in the original action. There is no evidence to show that the place where Macy bought the beer was the Slater building, or that it was on lot 21, block 26; nor is there any evidence whatever to show that this plaintiff had anything to do with the keeping of the Slater place, or even of the place where Macy bought beer, except that some one informed Macy that the woman who waited on him was a Mrs. Hinkle. It seems to us very clear that the evidence as shown by the return of the defendant entirely failed to show that plaintiff had violated said injunction. There being an entire absence of evidence, we think the court proceeded illegally in entering the judgment against the plaintiff, and said judgment is, therefore, REVERSED.

STATE OF IOWA V. CLINT BRAGG, Appellant.

CONVICTION FOR LIQUOR NUISANCE: NO ERROR SHOWN BY TRANSCRIPT.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

THURSDAY, FEBRUARY 8, 1894.

Affirmed.

PER CURIAM.—The defendant was accused by information of the crime of owning and keeping intoxicating liquor with intent to sell the same in violation of law. We infer from the record and the law that he was convicted of the crime charged in justice's court, and appealed to the district court. He was found guilty in that court, and adjudged to pay a fine of fifty dollars and costs, and to be imprisoned in the county jail for a specified time if the fine and costs were not paid. From that judgment he appeals to this court. The cause is submitted to us on a transcript of the information, judgment, notice of appeal, and appeal bond. We have inspected the record before us, without discovering any error prejudicial to the defendant. The judgment is, therefore, **AFFIRMED.**

STATE OF IOWA V. CLARA RUFFNER, Appellant.

CONVICTION FOR KEEPING HOUSE OF ILL FAME: NO ERROR DISCOVERED IN PARTIAL TRANSCRIPT.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

THURSDAY, FEBRUARY 8, 1894.

INDICTMENT for keeping house of ill fame. Verdict of guilty, and a judgment of imprisonment, from which the defendant appealed.—*Affirmed.*

THE cause was submitted by the attorney general on a transcript, no further appearance being made.

PER CURIAM.—The transcript is a partial one, the evidence not being included. An examination of it discloses no error and the judgment is **AFFIRMED.**

STATE OF IOWA V. ROBERT CALAHAN, Appellant.

CONVICTION FOR ASSAULT TO MURDER: NO ERROR DISCOVERED IN PARTIAL TRANSCRIPT.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FRIDAY, FEBRUARY 9, 1894.

INDICTMENT for an assault with intent to commit murder. The defendant appeals from a conviction and judgment of imprisonment in the penitentiary. The cause was submitted on a partial transcript, without the evidence, or instructions of the court.—*Affirmed.*

No appearance for appellant.

PER CURIAM.—We have examined the record, as the law requires, and, finding no error, the judgment is **AFFIRMED**.

FRANK T. CAMPBELL, SPENCER SMITH and PETER A. DEY, Railroad Commissioners In and For the State of Iowa, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

ACTION TO COMPEL CONFORMITY TO MAXIMUM RATE SCHEDULE: SECOND APPEAL, 53 N. W. Rep. 351, *followed*.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

TUESDAY, MAY 8, 1894.

ACTION in equity to compel the defendant to conform its charges to the schedule of maximum rates made by the board of railway commissioners, and applicable to its road. Judgment was rendered in favor of the plaintiffs. Defendant appeals.—*Affirmed.*

John W. Cary and George E. Clarke for appellant.

John Y. Stone, Attorney General, and *H. G. McMillan*, County Attorney, for appellees.

GIVEN, J.—This case was before this court on a former appeal by the plaintiffs from a judgment dismissing their petition, the case having been submitted below on the pleadings and on an agreed statement of facts. See 53 N. W. Rep. 351. Said judgment being reversed, and the case remanded, it was again submitted on the same pleadings and agreed statement of facts, and judgment rendered in favor of the plaintiffs, from which defendant prosecutes this appeal. The case is now before us upon

the same abstract and arguments as on the former submission, and no other or different questions are presented. A careful review of those questions fails to discover to us any reason for changing the conclusions announced in the former opinion, and, the judgment now appealed from being in harmony with that opinion, it is **AFFIRMED**.

A. P. PACKARD, Appellant, v. PERMELIA PACKARD.

FACTS HELD NOT TO JUSTIFY DESERTION BY WIFE.

Appeal from Calhoun District Court.—**HON. CHARLES D. GOLDSMITH,**
Judge.

WEDNESDAY, MAY 9, 1894.

ACTION for divorce on the ground of desertion. The defendant, by cross petition, seeks a divorce on the ground of cruel and inhuman treatment. The district court dismissed both petitions, and the plaintiff appealed.—*Reversed.*

M. B. McCrary for appellant.

No appearance for appellee.

GRANGER, J.—The plaintiff and defendant were married in February, 1880, she being the plaintiff's second wife. By the plaintiff's prior marriage he had five children. The parties lived together until November, 1889, when the defendant left the plaintiff. This action was commenced in February, 1892, charging willful desertion against the defendant. The answer denies the averments of the petition as to desertion, and by a cross petition charges cruel and inhuman treatment, with a prayer for divorce. The district court denied relief to both parties. The defendant has not appealed, and the adjudication in the district court is conclusive as to her on her claim for a divorce. The appeal by the plaintiff is from the action of the court in dismissing his petition, and hence the question before us is that of a willful desertion by the defendant. The fact that she left the plaintiff and lived apart from him for more than two years before the commencement of this action is not in dispute. With the condition of the record, the plaintiff is entitled to a divorce if the separation amounts to a willful desertion, and the continued absence was without reasonable cause. The evidence on the part of the plaintiff, standing alone, clearly establishes these facts. The only excuse for the separation is the showing made on the part of the defendant in support of her cross petition, which evidence was also probably intended to refute that of the plaintiff as to a willful desertion. It may be said that the evidence came far short of establishing either cruel or inhuman treatment on the part of the plaintiff, within the legal acceptance of the terms. It is true that the parties did not live pleasantly together; nor is it to be said that there was anything

seriously unpleasant. She says that he was cross and sulky to her. In testimony she said, "I asked him one time when he was going to Lake City, if he was going. Said he, 'Y-a-s.' I asked him why he would not renew a note to my sister, and he said I was enough to make a dog sick to have around. Mr. Packard's family treated me rather coolly at first. Some of them treated me kindly, and others did not. The summer before I left there, I was struck by the youngest boy. He had a map, and I told him three times to put it down. I came to put my hand on his shoulder, and he slapped me in the face, and broke my glasses, and it was quite a while before I could have them to use. I reached them to Mr. Packard to have them fixed, and he asked me how they got broken, and I told him the same story that I told before the court, and he made no reply whatever." At one time when she was going to Illinois on a visit she asked him for three or four dollars, and he only gave her one, and said: "I am not going to furnish you money to go visiting with." She complains of the doors being left open, and that they did not occupy the same sleeping apartments for about a year before the separation. In much of the testimony she is not positive, and in the more important part she is contradicted by other evidence. If the son struck her,—which in evidence he denies,—it does not appear that the plaintiff knew of it, or in any way encouraged or permitted such treatment. Nor does it appear that the plaintiff was in fault for their occupying separate sleeping apartments. A sister of the defendant lived with them during nearly all of their married life, and the plaintiff evidently entertained a dislike toward her, while, between the sisters, there was a warm attachment and a purpose to live together. The following from the testimony of the defendant quite clearly indicates the principal cause of the separation. "I left two years ago,—two or three years ago last November. Can't say for certain. Think three years ago. He spoke in the morning after I came back from Illinois, and wanted to know whose carpet that was on the floor. I said it was my sister's. He said, 'I want you to take that carpet up, and want you to do it now.' I said, 'When I get around, I will attend to it;' but I said, 'When that carpet goes, I shall go with it.' My mind was not made up when I came back. I don't know— Yes, my mind was made up, when I found my sister could not stay with me, not to live with him any longer; but there was other circumstances connected with it." We think the separation by the defendant without legal justification, and that desertion and absence without reasonable cause are shown by the evidence, for which the plaintiff is entitled to a divorce. It may be stated that defendant, in terms, says she would not again live with the plaintiff. The cause is remanded to the district court for a decree in accord with this opinion. **REVERSED.**

J. E. CURTIS v. C. GUTZ, Appellant.

CONTRACT TO SELL LAND: FORFEITURE FOR DEFAULT IN PAYMENT: EXTENSION: FACTS HELD NOT TO WARRANT FORFEITURE.

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Appeal from Calhoun District Court.—HON. CHARLES D. GOLDSMITH, Judge.

THURSDAY, MAY 10, 1894.

THIS cause was tried below as an equitable action, and is to be so tried in this court. On the tenth day of November, 1881, one Isaac H. Knox entered into a written contract with the defendant, whereby he agreed to sell to him one hundred and sixty acres of land in Calhoun county for an agreed price of five hundred and sixty dollars, the payments to be one hundred and forty dollars in hand, and the balance to be in four annual payments of one hundred and five dollars each. At the conclusion of the payments defendant was to receive a special warranty deed. The contract of sale contains a provision for a forfeiture in case of a failure to make any of the payments specified, or of taxes due on the land. Defendant made the first annual payment, due November 10, 1883. The other payments have not been made. Isaac H. Knox, deceased, and C. Gordon Knox succeeded to his interest in the land. On the sixth day of October, 1890, C. Gordon Knox elected, upon notice to defendant, to take a forfeiture of the contract. On the eighteenth day of October, 1890, C. Gordon Knox and wife conveyed their interest in the land to the plaintiff, and on the twenty-ninth of the same month this suit was commenced to recover possession. The pleadings present issues of facts to be further noticed in the opinion, and, upon the trial, judgment was entered for the plaintiff, and the defendant appealed.—*Reversed.*

M. B. & J. B. McCrary for appellant.

J. C. Kerr for appellee.

GRANGER, C. J.—Dates are quite important in this case. The contract of sale was made in 1881. The immediate conveyance on which Isaac Knox then relied to enable him to make a conveyance to defendant under the terms of his contract was a deed from the Dubuque Pacific Railway Company to him. This title was based on a grant of land by congress to aid in the construction of a railroad from Dubuque to Sioux City. The deed to Knox was dated June 14, 1858. The abstract of title attached to the petition, after presenting a chain of title from the United States, through the state of Iowa and the Dubuque Pacific Railway Company, to Isaac H. Knox, under the deed of June 14, 1859, also presents another chain, entirely distinct from the United States, through the state of Iowa, Calhoun county, and the American Emigrant Company to James

Callanan and J. C. Savery, and from them, by quitclaim deed, to this plaintiff, January 18, 1890. In the petition, as originally filed, plaintiff in general terms averred that he was the absolute owner in "fee simple" of the land, without averring on what conveyance he relied, and thereon sought his judgment of forfeiture and for possession. The answer, in avoidance of the claim of forfeiture, pleaded an extension of the time of payment by agreement. At the conclusion of the evidence the plaintiff filed an amendment to his petition as an additional count, making specific averment of title under the chain terminating in the conveyance by Callanan and Savery to plaintiff under date of January 18, 1890, and saying "that thereby the title to said land vested, and still vests, in plaintiff." The American Emigrant Company was the immediate grantor of Callanan and Savery, and this company instituted suit against this defendant to quiet its title to the land in the district court of Calhoun county, basing its claim of title on a swamp-land grant by congress under date of September 28, 1850. May 10, 1888, the district court entered its decree establishing the title in the company. Plaintiff, in his abstract of title, makes this decree a part of his chain of title, and in his amendment to his petition he sets out the decree as a basis of title. It was the contention as to the title, and the suit for its settlement, that caused the neglect to make the payments, for otherwise the defendant was at all times ready to make such payments, and has since the commencement of this suit—the title of the Emigrant Company being now in the plaintiff, as successor to Isaac H. Knox, so that he can obtain a title under his contract—tendered all that is due on the purchase price, and asks a confirmation of his title. Why should he not have it? Plaintiff relies on the provision of the contract by which he may declare a forfeiture in case of default in payment. The first default in payment was made November 10, 1883, and the last November 10, 1885. The record leads us to the conclusion that neither Isaac H. Knox nor his successors, barring the plaintiff, ever thought that they were in a position to observe, on their part, the terms of the contract as to a conveyance until after the decree in the emigrant company case against the defendant and the conveyance by Callanan and Savery to the plaintiff. During the period of contention as to the title no forfeiture was declared, or in any way claimed. The defendant has kept the taxes on the land fully paid. The forfeiture declared was by C. Gordon Knox, October 6, 1890, and he then conveys the land, by quitclaim deed, to plaintiff, on the eighteenth of the month, who commences this suit on the twenty-ninth of the month, adopting the declaration of forfeiture by Knox. The notes given for the deferred payments were made to and held by W. J. Barney & Co., of Chicago, instead of by the grantor. The obligations for payment were to the company. The company, after the default in payment, for a consideration, extended the time for payment in one or more or the notes from time to time; and as late as September 8, 1888, it called for tax receipts to be examined, with a view to know if defendant had paid the taxes. It appears that the entire business, including the making of the contract, was with W. J. Barney & Co., as agents, and we are satisfied that the company, either as real party in interest—of which

there is a claim in the case—or as agents, had full authority in the matter, and that the acts of the company are conclusive upon Isaac H. Knox and his successors in interest, including the plaintiff, who is seeking the forfeiture under the contract. The law, with its abhorrence of forfeiture, will not sanction one under such circumstances. Courts always construe conditions so as to save a forfeiture if it can fairly be done. Martind. Conv. [2 Ed.], 292.

Appellee attaches much importance to the fact that the contract provides for a special warranty, the thought being, apparently, that the grantor's obligation was only to make a deed, whether it conveyed a title or not. In general, a deed of special warranty limits its operation to certain persons or claims, or it may except from its operation certain persons or claims. In this contract the provision is to "convey * * * by deed of special warranty," without any words of special limitation as to persons or the subject-matter of the grant. There is, by the terms of the writing, to be a deed of warranty, and we assume that it means warranty of title, from the universal application of the term in deeds of conveyance. The instrument fails to show any particulars wherein it may be made special, nor does the record in any way show it, and hence the provision as to its being special seems to be without force. It will not do to say that a deed of special warranty means an instrument that really conveys nothing, or is absolutely without warranty. There is no phase of the case, as we view it, that will justify a decree of forfeiture against the defendant. He has been and is ready to do equity. He tenders the purchase price, with interest, which gives the grantor his own. The plaintiff evidently engaged in this enterprise as a legal venture, and with full knowledge of the situation. He is in no better situation than would be W. J. Barney & Co., or those for whom they act. Their claim for a forfeiture could not be entertained with favor. There should be a decree dismissing plaintiff's petition, and granting to defendant relief as prayed, and the cause is remanded for that purpose. This conclusion renders it unimportant to consider other questions presented. REVERSED.

PAUL LEADER V. SCOTT M. LADD, Judge.

VIOLATION OF LIQUOR SELLING INJUNCTION: FACTS HELD SUFFICIENT TO WARRANT PUNISHMENT FOR CONTEMPT.

FRIDAY, MAY 11, 1894.

THIS is a proceeding in *certiorari* to review the action of the district court of Woodbury county in adjudging plaintiff guilty of contempt. —*Affirmed.*

Argo, McDuffie & Argo for plaintiff.

Carter & Brown for defendant.

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GIVEN, J.—At the August term, 1890, of the district court for Woodbury county, a decree was duly entered, enjoining the plaintiff from selling, or keeping for sale intoxicating liquors, contrary to law, within the fourth judicial district of Iowa. Upon complaint duly made that plaintiff had violated said injunction, he was cited to appear, and show cause why he should not be punished for contempt. On the hearing, plaintiff was adjudged guilty, and judgment entered against him as authorized in such cases. The sole ground upon which said proceeding is questioned is that there was not sufficient evidence showing a violation of the injunction. The abstract of the evidence, as printed, might sustain this claim; but, as it comes to us, we see no room to doubt the plaintiff's guilt. The abstract has been corrected by certain interlineations in writing, and, as corrected, shows guilt, beyond any question. The judgment of the district court is **AFFIRMED**.

THE DES MOINES CITY RAILWAY COMPANY, Appellant, v. THE CITY OF DES MOINES *et al.*

TEARING UP CAR TRACKS: INJUNCTION.

Appeal from Polk District Court.—HON. S. F. BALLIETT, Judge.

SATURDAY, MAY 12, 1894.

ACTION in equity to restrain the defendants from removing or otherwise interfering with part of the railway track of the plaintiff. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiff appeals.—*Reversed*.

Guernsey & Bailly for appellant.

Hugh Brennan and *J. E. Mershon* for appellees.

ROBINSON, J.—The plaintiff is a corporation organized and existing under the laws of this state, and owns, and is engaged in the business of operating, a system of street railways in the city of Des Moines. The system includes what is known as the "Eleventh and Twelfth Street Line," the "Clark Street Line," and the "Jefferson Street Line." The Clark street line is a prolongation of the Eleventh and Twelfth street line, and is a little more than two miles in length. The Jefferson street line is somewhat shorter. The portions of Des Moines reached by these lines contain a large number of people, many of whom depend upon the street railway for transportation to the business part of the city, and have no other convenient means of reaching it. The Eleventh and Twelfth street line extends on Twelfth street from School street to University avenue,—a distance of two thousand, five hundred and fifty-two feet,—

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118	805
90	770
128	54

and is the part of the railway in controversy. It consists of a single track of two rails, placed in the center of the street, and has been in use for several years. In May, 1893, the city of Des Moines entered into a contract with Bryan & Youngerman for the construction of what is known as "Sewer number 2," which included a pipe sewer in Twelfth street where the railway in controversy is located. The city claims the right to construct the sewer in the center of the street, and to compel the temporary removal of the track for that purpose. The defendants Finkbine & Chase, as the board of public works of the city, have notified the plaintiff to remove its track to permit the construction of the sewer, and the plaintiff seeks to prevent all interference with the track. The district court dismissed the petition, and adjudged that plaintiff pay the costs of the action.

The plaintiff is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions arising under that ordinance were considered by this court in *Des Moines St. R'y Co. v. Des Moines B. G. St. R'y Co.*, 73 Iowa, 515, 33 N. W. Rep. 610, and 35 N. W. Rep. 602; *Id.*, 74 Iowa, 586, 38 N. W. Rep. 496. It was held in those cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the street railway company. In securing the contract for building the sewers, the contractors believed it would be placed in the center of the street, and perhaps were authorized to act upon that belief, for the reason that most of the sewers of the city had been placed in the center of the streets through which they were constructed, and possibly for other reasons. The contract, however, did not specify in terms in what part of the street the sewer should be placed, excepting that it should be laid "according to the lines and grades furnished from time to time by the city engineer." The construction of sewer number 2 was commenced by the contractor, and progressed to Eleventh street. The plaintiff had a line of railway in the center of that street, and, when it was reached by the contractor, the plaintiff was asked to remove the track to permit the building of the sewer in the center. It agreed to do so on condition that the sewer on Twelfth street should be placed on one side of its track in that street. The proposition appears to have been assented to by the contractor and by Mr. Finkbine, of the board of public works. Thereupon the plaintiff caused to be prepared and submitted to the city council a resolution, of which the following is a copy: "Resolved, that hereafter, where pipe sewers are being put down in the several streets of the city of Des Moines where there is a single track for street railway purposes, such track being in the center of the street, the sewer shall be laid outside of the line of street railway, and on one side of the street; the side of the street to be determined by the board of public works." The resolution was adopted on the seventeenth day of July, and the plaintiff complied with its part of the agreement by removing its track in eleventh street.

The resolution was reconsidered on the twenty-second day of September, after this action was commenced.

It is said by the appellee that every franchise is accepted subject to the police power of the state, which can not be bartered away, and the appellant assents to that proposition. But it is claimed that the demand made by the city is unreasonable, and, therefore, should not be enforced. It is well settled that a municipal ordinance or by-law, to be valid, "must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state," and that the courts may declare void, ordinances and by-laws which are not reasonable. *Meyers v. Railway Co.*, 57 Iowa, 557, 10 N. W. Rep. 896, and authorities therein cited; *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. Rep. 652. See, also, *City of St. Louis v. Weber*, 44 Mo. 547; 1 Beach, Pub. Corp., section 512; 1 Dill. Mun. Corp., sections 319-322; *Ex parte Chin Yan*, 60 Cal. 82. An ordinance is unreasonable if it be partial, unfair, or oppressive in its effects, as by imposing a serious burden without adequate cause. *Id.*; *Ex parte Frank*, 52 Cal. 606; *Harrisburg City Pass. Ry Co. v. City of Harrisburg*, 24 Atl. Rep. (Pa. Sup.) 56. It is not shown that the sewer in question was located in the center of Twelfth street by ordinance; but, conceding that it was so located by action as formal, and entitled to as much weight, as an ordinance, we are required to determine whether that action was reasonable and valid. The ordinance of the year 1866 required that all single tracks be laid in the center of the streets in all cases when it should be practicable to so lay them. The railway in question was constructed according to that requirement, and a large amount of labor and material has been used, and much time spent, in making a good roadbed. The cost to the plaintiff of removing its track to permit the construction of the sewer, and replacing it after the sewer is constructed, including the making of a good roadbed, would be about three thousand dollars. It would require years to make as good and safe a roadbed as the one now under the track, and the tearing up of the track would cause great inconvenience to patrons of the road, and would necessarily reduce the receipts of the plaintiff during the time that the sewer was being constructed. The reasons urged for placing the sewer in the center of the street are, that nearly all of the sewers in the city are placed in the centers of streets, and those placed at the sides are few, and so placed for exceptional reasons; that the contract made for building the sewer required it to be located in the center of the street; that to change it to the side would cause great expense, delay, and inconvenience; that the city has at all times required water pipes to be laid at one side of the streets, and gas pipes at the other, and that the property owners at one side of the street would be at greater expense than those on the other to connect with the sewer, if it is placed at the side. The evidence shows clearly that the sewer can be placed outside of the line of the railway without impairing, in any respect, the efficiency of the sewer system, and that sanitary considerations do not require that it be placed in the center of the street. If the sewer is placed at the side, the increase of the cost of

making a single connection between the sewer and the property on the side of the street furthest away would not exceed three dollars. Whether the contract for the sewer requires that it be located in the center of the street we need not determine, as the contract provides that any change in the plans or specifications shall not work a forfeiture, and that the difference in cost caused by the changes shall be determined by the engineer and board of public works on the basis of the contractor's bid. The evidence shows that the expense of constructing the sewer at the side of the street need not be materially, if any, greater than to place it in the center. We are of the opinion that the reasons for placing it in the center of the street are not of sufficient importance to impose upon the plaintiff the burden of removing its track, and to expose the patrons of this line to the inconvenience and danger which would be caused by such a removal. In other words, we think the demand of the city is unreasonable. It is shown that, if the plaintiff will transfer its passengers at the point where the workmen engaged in constructing the sewer shall be at work, the cost of constructing it will not be materially increased, and the plaintiff avers its willingness to make such transfer. If required by the city, it will be provided for in the decree. It is said the plaintiff has an adequate remedy at law, but we think not. It has a right to protect its track and roadbed by an action of this nature. The decree of the district court is REVERSED.

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